Public Comments on Financial Privacy and Bankruptcy

http://www.usdoj.gov/ust/privacy/privacy.htm

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Financial Privacy Study
Public Comment Matrix

#	Date Received	From	Summary	# of Pages
1	9-25-00	Joan Z. Bernstein Director of Consumer Protection Federal Trade Commision	The disclosure or sale of sensitive debtor information facilitates identity theft, violates trustee's fiduciary duties, and contravenes applicable law.	11
2	9-24-00	James I. Shepard	Electronic filing and internet access to debtor data are absolute necessities.	1
3	9-22-00	Ronald L. Plesser Piper Marbury Rudnick & Wolfe LLP	The openness of the public record is consistent with historical privacy interests. Computerization has democratized access to court record information.	6
4	9-22-00	Noah J. Hanft Senior Vice President MasterCard International	Debtors should receive notice that judicial records must be available to the public. Trade secrets, defamatory, or sensitive information could be protected on a case-by-case basis.	6
5	9-22-00	Robert F. McKew Vice President and General Counsel American Financial Services Association	Increased bankruptcy record access increases the system's efficiency. Information restrictions would be costly and unconstitutional. Debtors must sacrifice some privacy to enjoy bankruptcy's extraordinary remedies.	17
6	9-22-00	Aimee Campin Director of Regulatory Affairs Iowa Credit Union League	Establish information restrictions for general public but not for creditors who need the information to make solid business decisions.	3
7	9-22-00	Deirdre Mulligan Staff Counsel Center for Democracy and Technology	Improved technology should increase public review and oversight. Thoughtful information policy should prevent inappropriate disclosures. Use 1973 Code of Information Practices (HEW) as a guide.	7

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#	Date Received	From	Summary	# of Pages
8	9-22-00	John F. Kozlowski General Counsel Ohio Credit Union League	All bankruptcy case information should not be publicly accessible and trustees should not market bankruptcy information.	5
9	9-22-00	Jeffrey Bloch Assistant General Counsel Credit Union National Association	Creditor's need for information clearly outweighs debtor's potential loss of privacy. ID thieves are generally not interested in debtors.	4
10	9-22-00	J. Michael de Janes General Counsel Choicepoint, Inc.	Continued access to public records including bankruptcy filings is important for the greater good.	7
11	9-22-00	Richard Blumenthal Attorney General Connecticut	Internet access to bankruptcy records saves time and money, but debtors' privacy must be protected.	2
12	9-22-00	S.E. Kurlansky sekurl@hotmail.com	There should be a separate personal ID number made public without violating individual privacy.	1
13	9-22-00	Mary Jeffrey, Esquire mejeffrey.esq@juno.com	Protect the confidentiality of the victims of domestic abuse. Create a lock box system for receiving mail.	1
14	9-22-00	Marcia Z. Sullivan Director, Government Relations Consumer Bankers Association	Should continue to make bankruptcy information publicly available because of common law tradition, constitutional guarantees, and practical realities.	5
15	9-20-00	Patrick M. Frawley Director, Regulatory Relations Bank of America	Technology increases public access to bankruptcy information and improves bankruptcy case administration.	3

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#	Date Received	From	Summary	# of Pages
16	9-18-00	Beth Givens Director Privacy Rights Clearing House	Starting point is Fair Information Principles (FIP): collection limitation, data quality, purpose specification, use limitation, security, openness (notice), individual participation, and accountability.	10
17	9-18-00	Elizabeth Costello UAW Legal Services	Put bankruptcy information on the web. Protect privacy with passwords and access tracking.	1
18	9-18-00	Russell R. Clark President New Jersey Credit Union League	Internet changes analysis - makes local bankruptcy information available worldwide. Vulnerable debtors need protection.	2
19	9-15-00	Sharman A. McCarvel sharmanmccarvel@juno. com	Like storage cubicles improve a child's sense of security in daycare, privacy protection in this internet age support our constitutional right to be secure in our private property.	1
20	9-15-00	Mary Jo Obee Chief Deputy Clerk USBC-W.D. Okla.	Do we strip bankruptcy data of personal identifiers and provide broad public access or limit access to parties in interest?	9
21	9-13-00	John Binns	Abuse of court records openness is one small price of freedom.	1
22	9-12-00	W.A. Earner, Jr. Navy Federal Credit Union	Improve access to financial information in bankruptcy cases. The public's right to know outweighs the debtor's expectations for traditional views of the right to privacy.	2
23	9-8-00	James R. Silkensen Executive Vice President NJ League Community & Savings Bankers	General Policy - protect non-public, personal information, but a bank as a party to a bankruptcy needs full access to pursue its claim.	1

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#	Date Received	From	Summary	# of Pages
24	9-8-00	Stuart K. Pratt Vice President Government Relations Associated Credit Bureaus, Inc.	The credit reporting industry gathers essential data from bankruptcy records and must have access to ensure its accuracy. Credit Bureaus are governed by the Fair Credit Reporting Act (915 U.S.C. 1681) which protects the confidentiality of case information.	2
25	9-8-00	Professor Karen Gross New York Law School	Revisit Section 107 and define "public", reassess what data we should collect, assess how non-bankruptcy law privacy protections are impaired by wide access to bankruptcy files. Why hold the system hostage to data access costs?	7
26	9-8-00	Beth L. Climo Managing Director American Bankers Association	New information technology making bankruptcy data more accessible substantially improves the bankruptcy process. The extraordinary legal relief includes an inherent privacy loss in the public judicial process - give debtors clear notice of privacy loss.	9
27	9-8-00	Charlotte M. Bahin Director of Regulatory Affairs Senior Regulatory Counsel	Community bankers need full access to all of the information in the public and non-public file.	5
28	9-7-00	Brian K. Long National Group President Dolan Media Company	Currently bankruptcy laws adequately balance private and public interests. Law changes would increase creditor costs, raise interest rates, and reduce debtor protection.	5

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#	Date Received	From	Summary	# of Pages
29	9-7-00	Russell W. Schrader Senior Vice President and Assistant General Counsel Visa U.S.A. Inc.	Electronic collection and dissemination benefits both creditors and debtors - potential adverse effect is inherently LESS in the bankruptcy context than when individual is solvent.	4
30	9-7-00	Richard Harris Manager Specialized Investigations	Oppose any restrictions on the public's access to bankruptcy information.	1
31	9-4-00	Jay D. Lagree	Only parties in interest should have access to bankruptcy records and that information should not be disclosed without the debtor's permission.	1
32	9-2-00	Steve & Liz Ziegler	No public access, but limited access to those who need to know, and apply definite security measures.	1
33	8-29-00	Paula M. Sumimoto Training and Compliance Coordinator University of Hawaii Federal Credit Union	Consumer privacy is a concern but the bankruptcy system needs public information for accuracy and accountability.	2
34	8-21-00	Sharman McCarvel	Massive collection of social security numbers by computer is a national security issue and could cause a serious disaster. "Let's clothe the naked here. And only expose that which is essentially necessary - not everything. OK?"	2

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#	Date Received	From	Summary	# of Pages
35	8-21-00	William E. Fason Owner/Manager Office of Judgement Enforcement	Oppose any restrictions on the public's access to bankruptcy information.	1
36	8-4-00	Mary Jo Obee Chief Deputy Clerk USBC-W.D. Okla.	Article - "Privacy in the Federal Bankruptcy Courts" - concerned about disclosing social security numbers and other personally identifiable private information. Notre Dame Journal of Law, Summer 2000.	73
37	7-28-00	Michael Wilson mwilson@abserv.org	Make data available but remove identifiers.	1
	Received After the Deadline			
38	9-28-00	Karen Cordry National Association of Attorneys General	Object to debtor's (toysmart.com) proposed sale of personal customer information.	82
39	9-28-00	Bev Williams	Bankruptcy is a privelege not a right. Creditors must have access to bankruptcy information to prevent debtor fraud and abuse.	1
40	9-29-00	Norma Hammes National Association of Consumer Bankruptcy Attorneys	Serious penalties should be imposed on those who disseminate sensitive bankruptcy information to anyone except a party in interest.	7

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#	Date Received	From	Summary	# of Pages
41	10-2-00	Kevin Anderson National Data Center	Only distribute appropriate bankruptcy information to parties in interest, and provide adequate safeguards to prevent violations of a debtor's "reasonable privacy interests."	10

DEPARTMENT OF JUSTICE

DEPARTMENT OF THE TREASURY

OFFICE OF MANAGEMENT AND BUDGET

Public Comment on Financial Privacy and Bankruptcy

AGENCIES: Department Justice, Department of the Treasury, and Office of Management and Budget

SUMMARY: The Department of Justice, Department of Treasury and Office of Management and Budget, in consultation with the Administrative Office of the U.S. Courts, are conducting a study (the "Study") of how the filing of a bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The Study will consider how the privacy interests of debtors in personal bankruptcy cases are affected by the public availability of information about them in those cases. It will also consider the need for access to this information and accountability in the bankruptcy system. Finally, it will consider how changes in business practices and technology may affect all of these interests. To assist in the Study, these agencies are requesting public comment on a series of questions.

DATES: To ensure their consideration in the Study, comments and responses to the questions listed below, along with any other comments, should be submitted by September 8, 2000.

ADDRESSES: All submissions must be in writing or in electronic form. Written submissions should be sent to Leander Barnhill, Office of General Counsel, Executive Office for United States Trustees, 901 E Street, NW, Suite 780, Washington DC 20530. Electronic submissions should be sent by email to USTPrivacyStudy@usdoj.gov The submissions should include the submitter's name, address, telephone number, and if available, FAX number and e-mail address. All submissions should be captioned “Comments on Study of Privacy Issues in Bankruptcy Data.”

SUPPLEMENTARY INFORMATION:

I. Background

On April 30, 2000, the President announced the “Clinton-Gore Plan to Enhance Consumers: Financial Privacy: Protecting Core Values in The Information Age.” As part of the Plan, the President directed three federal agencies to conduct a study on Ahow best to handle privacy issues for sensitive financial information in bankruptcy records,@ including Athe privacy impact of electronic availability of detailed bankruptcy records, containing financial information of vulnerable debtors.” The Study, to be jointly conducted by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the "Study Agencies"), will be prepared in consultation with the Administrative Office of the U.S. Courts, and will be completed by December 31, 2000. The Study Agencies are requesting public comment on a series of questions regarding privacy issues related to records that are established in the course of bankruptcy proceedings conducted in federal courts, including questions raised by electronic access to such bankruptcy records. The Study Agencies solicit responses to any or all of the questions listed below and welcome any other comments on these topics.

The Study Agencies also are aware of public attention in recent weeks focused on the troubling practice of organizations in bankruptcy seeking to sell personal data regarding their former customers, in violation of such organizations' privacy policies. Although this issue is outside the main scope of the Study – the privacy needs of debtors – the Study Agencies believe that this topic also involves the intersection of privacy and bankruptcy, and merits further attention. In part because of pending regulatory enforcement actions and/or pending legislation, the Study Agencies are not making this subject part of the formal Study. Nevertheless, the Study Agencies invite comments about the effect that a business bankruptcy filing has on consumer/customer information that the business has collected. Comments should not address pending legislative proposals or regulatory activities. After reviewing the comments and any other developments, the Study Agencies will determine whether it is appropriate to examine this issue in greater depth.

Currently, there are two different types of data maintained and used in a bankruptcy proceeding. The first is information in a court record that is made available to any member of the public. The second is information held by trustees administering bankruptcy cases that is not generally available to the public. These two categories of data are referred to here as Apublic record data@ and Anon-public data,@ respectively, and they are described more fully below. Each is currently governed by a different set of rules and procedures, and the privacy and access interests in each may vary.

A. Public Record Data

A consumer or individual who files a case under either chapter 7 or chapter 13 of the Bankruptcy Code, 11 U.S.C. ' 101 et seq., must provide detailed financial information as part of the schedules filed with the bankruptcy court. This includes a list of bank accounts and identifying numbers, credit card account numbers, social security numbers, balances in bank accounts, balances owed to creditors, income, a detailed listing of assets, and a budget showing the individual=s regular expenses. By statute, 11 U.S.C. § 107(a), all documents filed with the court are "public records and open to examination by an entity at reasonable times without charge." Bankruptcy trustees (private entities appointed by U.S. Trustees) obtain this information in the course of administering cases assigned to them.

Much of the information provided in connection with a bankruptcy case is similar to financial information that, in other contexts, such as banking and credit reporting, may be covered by a system of regulation designed to ensure the confidentiality of such information. For example, in other contexts, an individual would be given notice of what uses might be made of the individual=s bank account information or social security number, and would have some degree of choice as to how such information will be used. Security safeguards may also attach to the information.

In the past, access to public court record data has as a practical matter been quite limited. The individuals who obtained individual case files from the courts were those willing to spend considerable time, effort, and sometimes money. The development of electronic databases and other technologies allows for more widespread dissemination of information in bankruptcy records, along with far more convenient access, including access via the Internet. In some

instances, courts are adopting technologies to convert their paper files to electronic form. This could result in a high volume of court records, including records containing sensitive personal information, appearing on the Internet.

B. Non-Public Data

While substantial amounts of personal data are filed by debtors in the bankruptcy courts, additional data are gathered by bankruptcy trustees in the course of administering the cases assigned to them. The trustee often will collect information about claims filed by creditors in a given case. The trustee also may find it necessary to supplement information that a debtor has provided in the bankruptcy schedules, and may request tax returns, as well as supporting information about the value of the debtor's assets, amounts of liabilities, and routine living expenses. The trustee's files also may contain information gathered from investigations about alleged wrongdoing in the case. In chapter 13 cases, the trustee tracks a debtor's payments to creditors under a payment plan. In general, only the parties in interest in a bankruptcy case (as defined by the court) receive both public and non-public data. By statute, the trustee "shall, unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." 11 U.S.C. §§ 704(7), §1302(b)(1). However, there are no well-defined limits on the trustee's authority to provide this information to others, nor on the authority of such third parties to use, sell, or transfer this information. In addition, some trustees and creditors are considering compiling information contained in

bankruptcy records electronically for easier administration of bankruptcy cases in which they have a claim. They may also envision some possible commercial use.

II Elements of the Study

The Study will examine:

- The types and amounts of information that are collected from and about individual debtors, as well as analyzed and disseminated, in personal bankruptcy cases.

- Current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings.

- The needs of various parties for access to financial information in personal bankruptcy cases, including specifically which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances.

- The privacy issues raised by the collection and use of financial and other information in personal bankruptcy cases.

- The effect of technology on access to, and the privacy of, a debtor's personal information.

- **$** Business or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records.

- **$** Principles for the responsible handling of information in bankruptcy records, and recommendations for any policy, regulatory, or statutory changes.

II Questions to be Addressed

The Study Agencies seek comment and supporting information from all sources, including bankruptcy professionals, consumer representatives, privacy advocates, creditors, information brokers, the academic community, and the general public. The Study Agencies will summarize the comments in the Study. Views are welcome on any aspect of this subject, but the following questions are offered to stimulate thought in specific areas of interest.

1.01 **What types and amounts of information are collected from and about individual debtors, analyzed, and disseminated in personal bankruptcy cases?**

(1.1) What types of information are collected, maintained, and disseminated in bankruptcy?

(1.2) Which of these data elements are public record data?

(1.3) Which are non-public record data held by bankruptcy trustees?

(1.4) How much data is at issue?

(1.5) Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

(1.6) How valuable is the information in the marketplace?

2.0 What are the current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings?

(2.1) What methods of data collection and aggregation are now used by the courts, creditors, trustees, and other private actors to collect, analyze, and disseminate public record data and non-public data?

(2.2) What methods are being contemplated for the future?

3.0 What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances?

(3.1) What entities currently access public record data?

(3.2) What entities currently access non-public data from trustees?

(3.3) What specific data elements do they need, and for what purposes?

(3.4) Are the purposes for which the information is sought consistent with the public interest?

A. Public Record Data

(3.5) What data elements in public record data should remain public for purposes of accountability in the bankruptcy system? For other purposes?

(3.6) Is there certain information that need not be made available to the general public, but could be made available to a limited class of persons?

(3.7) If so, what are these data elements, to whom should they be made available, and for what purpose?

(3.8) Is there a need to make the following data elements publicly available: (a) social security numbers, (b) bank account numbers, (c) other account numbers?

B. Non-Public Data

(3.9) What issues, if any, are raised by existing limitations on trustees' handling of personal information?

(3.10) Are all of the data elements held by bankruptcy trustees necessary for case administration purposes? If not, which data elements are not?

(3.11) What interests would be served by private or commercial enterprises collecting, compiling electronically, and redistributing information from bankruptcy cases?

4.0 What are the privacy issues raised by the collection and use of personal financial and other information in personal bankruptcy proceedings?

A. Public Record Data

(4.1) Do debtors have privacy interests in information contained in public record data made available through the bankruptcy courts? If so, what are those interests? Do they vary by data element? If so, how?

(4.2) What are the benefits of a public record system for court records in bankruptcy cases?

(4.3) What are the costs of collecting and retaining data in bankruptcy cases?

(4.4) To what extent do individuals who file for bankruptcy understand that all of the information contained in the public bankruptcy file is available to the public?

(4.5) Should debtors in bankruptcy be required to forego some expectation of privacy that other consumers have under other circumstances?

(4.6) Are there characteristics about debtors in bankruptcy that raise special concerns about wide public dissemination of their personal financial information?

B. Non-Public Data

(4.7) What are debtors' expectations about what uses and disclosures of information will be made by bankruptcy trustees?

(4.8) What, if any, privacy interests lie in non-public bankruptcy data held by bankruptcy trustees?

(4.9) If non-public data were made widely available to the public or to creditors for other non-bankruptcy purposes, what might be the consequences?

(4.10) Are privacy interests affected if the distribution of non-public data bankruptcy information is for profit?

5.0 What is the effect of technology on access to and privacy of personal information?

(5.1) Do privacy issues related to public record data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?

(5.2) Do privacy interests in non-public data change when such data are compiled electronically for ease of administration of bankruptcy cases? For commercial use? For other use?

(5.3) Are new technologies being used to improve access to court records? Non-public bankruptcy data? Should they be? Why or why not?

6.0 What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?

(6.1) What statutes, rules, or policies can serve as models for maintaining appropriate levels or access and privacy protection for public bankruptcy records? For non-public bankruptcy information held by trustees?

(6.2) What statutes, rules, or policies are ineffective in providing appropriate access and privacy interests?

(6.3) What statutes, rules, or policies, are otherwise relevant to this Study?

7.0 What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy, regulatory or statutory changes?

A. Public Record Data

(7.1) To what extent are privacy safeguards appropriate for public record data? If safeguards are appropriate, what should they be? How should they be crafted to ensure that they do not interfere with legitimate public needs to access certain bankruptcy data?

(7.2) Should notice about the public nature of bankruptcy filings be provided to individuals who file for bankruptcy? What form should such notice take?

(7.3) Should there be any restrictions on the degree of accessibility of such information, such as rules that vary if information is made available electronically? via the Internet? If so, what should they be? Should policies on the handling of information in bankruptcy cases be technology neutral, so that the rules for dealing with information are the same regardless of what medium is used to disclose such information? Why or why not?

(7.4) Are there any data elements in public record data that should be removed from the public record and held instead as non-public data by bankruptcy trustees or courts?

(7.5) Is there some experience with other public records that is relevant to the privacy and access issues in bankruptcy cases? Do any records or filing systems, for example in the courts, provide instruction in this regard?

B. Non-Public Data

(7.6) To what extent are privacy safeguards appropriate for non-public data held by bankruptcy trustees in bankruptcy cases? If some safeguards are appropriate, how should they be structured? How should they be crafted to ensure that they not interfere with the needs of bankruptcy trustees to administer their cases?

(7.7) Should debtors receive notice of what uses and disclosures will be made of their information in the hands of bankruptcy trustees? What would be the effects of such disclosures?

(7.8) Should restrictions be imposed on the use and disclosure of information held by bankruptcy trustees? If so, what types of restrictions? What would be the effects of such restrictions?

(7.9) Should debtors be permitted to access the information held about them by bankruptcy trustees? If so, under what circumstances? What would be the effects of such access?

(7.10) If bankruptcy data are compiled and made easily and widely available to users outside of the bankruptcy system, should these users be charged for the collection and distribution process? How would the amount of the charge be set?

Date: 7/21/2000

(Original Signed)
Kevyn Orr
Director, Executive Office For United States Trustees
Department of Justice

Date: 7/24/2000

(Original Signed)
Gregory A. Baer
Assistant Secretary for Financial Institutions
Department of the Treasury

Date: 7/21/2000

(Original Signed)
John T. Spotila
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

September 25, 2000

BY E-MAIL
& HAND-DELIVERY
Leander D. Barnhill, Esq.
U. S. Department of Justice
Executive Office for United States Trustees
Office of the General Counsel
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Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

The staff of the Federal Trade Commission's Bureau of Consumer Protection is pleased to offer comments in response to the request for public comment by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the Study Agencies).[1] The Study Agencies are conducting a study (the Study) of how the filing for bankruptcy relief affects the privacy of individual consumer information that becomes part of a bankruptcy case.2

This comment focuses on the privacy and identity theft issues raised by the collection and use of personal financial and other information in personal bankruptcy cases. As a threshold matter, the Study Agencies may wish to consider to what extent highly sensitive information, such as a consumer's social security number, must be included in public record data in light of the increased risk of identity theft and other illegal conduct. The comment also suggests that the

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[1] These comments are the views of the staff of the Bureau of Consumer Protection of the Federal Trade Commission. They do not necessarily represent the views of the Commission or any individual Commissioner.

[2] *See* Federal Register Notice Requesting Public Comment on Financial Privacy and Bankruptcy, 65 Fed. Reg. 46735 (July 31, 2000) (the Federal Register Notice).

Study Agencies consider prohibiting the commercial use by trustees of debtors' non-public data for purposes other than for which the information was collected (i.e., to administer the bankruptcy case). Finally, the comment suggests evaluating the interplay between consumers' privacy interests and the Bankruptcy Code, focusing for example, on issues where private customer information is protected by a company's privacy statement,

A. Interest and Expertise of the Federal Trade Commission

The Federal Trade Commission (Commission or FTC) is an independent law enforcement agency whose mission is to promote the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting vigorous competition. The Commission's primary legislative mandate is to enforce the Federal Trade Commission Act (FTCA), which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[3] With the exception of certain industries, the FTCA provides the Commission with broad law enforcement authority over entities engaged in or whose business affects commerce.[4] Pursuant to these responsibilities, the Commission has acquired considerable experience in addressing privacy issues in both the online and offline worlds,[5] and has long had particular interest in, and gained extensive experience dealing with,

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[3] 15 U.S.C. $45(a).

[4] The Commission does not have criminal law enforcement authority. Further, certain entities, such as banks, savings and loan associations, and common carriers, as well as the business of insurance, are wholly or partially-exempt from Commission jurisdiction. See Section 5(a)(2) of the FTC Act, 15 U SC. § 45(a)(2), and the McCarran-Ferguson Act, 15 USC. § 1012(b).

[5] The FTC Act and most other statutes enforced by the Commission apply equally in the offline and online worlds. Thus, the agency has brought law enforcement actions to protect privacy online pursuant to its general mandate to fight unfair and deceptive practices, see, *e.g., FTC v. ReverseAuction.com,* Inc., No. 00-0032 (D.D.C. Jan. 6, 2000) (settling charges that an online

privacy and consumer protection issues.3

Beginning in April 1995, the Commission held a series of public workshops on online privacy and related issues. It also has examined: Web site practices in the collection, use, and transfer of consumers' personal information; self-regulatory efforts and technological developments to enhance consumer privacy; consumer and business education efforts; the role of government in protecting online information privacy; and special issues raised by the online collection and use of information from and about children.[7] The Commission also has issued a series of reports to Congress regarding privacy online: *Privacy Online: Fair Information Practices in the Electronic Marketplace* (May 2000) (2000 Report); *Self-Regulation and Privacy Online: A Report to Congress* (July *1999); Privacy Online: A Report* to *Congress* (June 1998)

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auction site obtained consumers' personal identifying information from a competitor site and then sent deceptive, unsolicited e-mail messages to those consumers seeking their business); and it also has pursued law enforcement, where appropriate, to address offline privacy concerns. See, e.g., *In re Trans Union,* Docket *No. 9255* (Feb. 10, 2000), *appeal docketed, No.* 00-l 141 (D.C. Cir. Apr. 4, 2000)(alleging that defendants' sale of individual credit information to target marketers was a violation of the Fair Credit Reporting Act).

[6]In particular, the Commission has law enforcement responsibilities under the Fair Credit Reporting Act, which, among other things, limits disclosure of "consumer reports" by consumer reporting agencies, 15 U.S.C. §§ 168 1 *et* seq., and under the Gramm-Leach-Bliley Act which restricts the disclosure of consumers' personal financial information by certain financial institutions, 15 U.S.C. §§ 6801-6809 (Subtitle A).

[7]The Commission and its staff have issued reports describing various privacy concerns in the electronic marketplace. *See, e.g., Online Profiling: A Report to Congress* (June 2000); *Online Profiling: A Report to Congress, Part* 2 (July 2000); *Individual Reference Services: A Federal Trade Commission Report to Congress* (Dec. *1997); FTC Staff Report; Public Workshop on Consumer Privacy on the Global Information Infrastructure* (Dec. 1996); *FTC Staff Report: Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace* (May 1996). The Commission has also recently issued a rule implementing the privacy provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq. See* 16 C.F.R. Part 3 13, available at <http://www.ftc.gov/os/2000/05/glb000512.pdf>.

(1998 Report). In its 2000 Report, a majority of the Commission recommended to Congress that consumer-oriented commercial Web sites that collect personal identifying information from or about consumers online be required to comply with fair information practices.[8]

Concurrent with its online privacy activities, the Commission has implemented the Identity Theft and Assumption Deterrence Act of 1998.[9] That Act directed the FTC to establish the federal government's centralized repository for identity theft complaints and victim assistance. Indeed, the Commission's toll free hotline, which was established so that consumers could report identity theft and obtain counseling to resolve identity theft issues, averaged over 1,000 calls per week during the months of July and August, 2000.

Identity theft occurs when a person's identifying information -- name, social security number, mother's maiden name, or other personal information -- has been used by another to commit fraud or engage in other unlawful activities. Common forms of identity theft include taking over an existing credit card account and making unauthorized charges on it; taking out loans in another person's name; writing fraudulent checks using another person's name and/or account number; and opening a telephone or wireless service account in another person's name. In extreme cases, the identity thief may completely take over his or her victim's identity --

[8]These fair information practice principles include: (1) notice (data collectors must disclose their information practices before collecting personal information from consumers); (2) choice (consumers must be allowed to choose whether and how personal information may be used for purposes beyond those for which the information was provided); (3) access (consumers should be able to view and contest the accuracy and completeness of data collected about them); and (4) security (data collectors must take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use).

[9]For a description of the FTC's identity theft activities, see Statement of the Federal Trade Commission on Identity Theft, United States House of Representatives, Committee on Banking and Financial Services (Sept. 13, 2000) <http://www.ftc.gov/os/2000/09/idthefttest.htm>.

opening a bank account, obtaining multiple credit cards, buying a car, getting a home mortgage and even working, or being arrested under the victim's name.

Although statistics from the Commission's Identity Theft Data Clearinghouse show that about 80 percent of identity theft victims who have filed a complaint with the Commission report finance-related fraud, such as the opening of fraudulent credit, loan, bank, or telecommunications accounts,[10] the Commission also has received hundreds of complaints involving an identity thief obtaining employment, compiling an arrest record, or receiving government benefits in the victim's name. Most of the consumers filing these complaints did not know how their personal information had been compromised. However, the victim's social security number, coupled with date of birth, are key pieces of information for identity thieves. These key pieces of information are of course contained in bankruptcy filings.

B. Privacy and Identity Theft Issues Raised By the Collection and Handling of Sensitive Information in Bankruptcy

The Study Agencies may wish to consider crafting future policies and procedures regarding the collection, use, and dissemination of personal information in light of the highly sensitive nature of the data collected and the new technological ease by which it can be used to facilitate identity theft and other illegal activities. Personal bankruptcy cases may involve the collection of highly sensitive personal information, such as social security numbers, financial information, credit information, income, and details about routine living expenses

As a threshold matter, the Study Agencies may wish to consider whether certain items of highly sensitive personal information, such as an individual social security number, needs to be

[10] The data analysis applies to the period from November 1999 through August 2000.

included in "public record" data. It may not be necessary for those creditors, and other persons who need notice of the filing and access to relevant information about the debtor, to gain access to such sensitive data through a public record. This concern is heightened by the increasing availability on the Internet of courts' public record data as well as data compiled offline from these same records that is subsequently made available on the Internet. As noted above, a social security number is currently the key piece of identifying information used to commit identity theft. Internet publication of social security numbers through the bankruptcy process is one way for identity thieves to ply their trade in a manner that is completely invisible to their victims and impossible for consumers to avoid or mitigate. For example, the identity thief can use a victim's social security number to open fraudulent credit, loan, bank, or utility accounts in the victim's name. A valid social security number is also essential to the thief's ability to obtain a driver's license or other official identification in a victim's name, and to obtain employment in a victim's name.9

Additionally, to the extent the Study Agencies determine that certain personal information should be kept on the public record as part of the bankruptcy case, they may wish to consider the feasibility of restricting, in an appropriately tailored manner, the commercial use of such public record data for certain purposes unrelated to the bankruptcy

As a related point, the Study Agencies have asked commenters to address "[p]rinciples for

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[11] Importantly, although social security numbers serve as the critical piece of information needed to facilitate identity theft, other personal information routinely provided as part of public record data in bankruptcy cases also can assist criminals. Such personal information can include an individual's credit card information and bank account numbers. Easy access to this information on the Internet through the bankruptcy process could further facilitate identity theft as well as increase the risk of unauthorized debiting of accounts. That the individuals had filed for and obtained relief in bankruptcy likely would not deter such wrongdoing.

the responsible handling of information in bankruptcy records" and describe "[b]usiness or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records."[12/] Recognizing that certain information necessarily must be placed on the public record during a bankruptcy case, the Study Agencies should consider ensuring that debtors are given notice as soon as possible in the bankruptcy process as to how their information will be used and whether and how it will be disclosed. Consumers cannot fully consider the implications of pursuing relief from their debts in bankruptcy unless they are informed of the consequences and the extent and means by which their personal and financial information will be divulged to parties in interest and the larger public. The Study Agencies may wish to consider a requirement that potential debtors receive clear and conspicuous notice of this information before any filing is made to begin the bankruptcy process. For example, if the Study Agencies require that putative debtors receive notice of the potential dissemination of bankruptcy information before filing, the burden of disclosure will rest on debtors' counsel in the pre-filing consultation process. In this scenario, counsel would be required to certify that they have notified debtors of the consequences of providing their personal and financial information. Currently, counsel are required to certify that they have discussed with individuals whose debts are primarily consumer debts the types of relief available to them through the various chapters of the Code (see Bankruptcy Official Form 1). A certification of disclosures regarding dissemination of private information could be accomplished in the same manner. Alternatively, such disclosures could be made post-filing at the first meeting of creditors conducted pursuant to Section 341 of the Bankruptcy Code. The disclosures could be made in the informational sheets that the United States Trustees or their

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[12/] 65 Fed. Reg. 46736.

designees presently distribute at Section 341 meetings.3

C. **Future Practices for Collecting, Analyzing and Disseminating Information in Personal Bankruptcy Cases**

The Study Agencies have noted that "some trustees and creditors are considering compiling information contained in bankruptcy records electronically for easier administration of bankruptcy cases in which they have a claim. They may also envision some possible commercial use."[14] The Study Agencies have asked for comment on an appropriate commercial use of such information.

"Non-public" data, described in the Federal Register Notice as "additional data gathered by bankruptcy trustees in the course of administering the cases assigned to them," can include tax returns, and additional documentation or information regarding the value of &sets and amounts of liabilities. Commercial use of such highly personal and sensitive non-public data raises several problematic issues and should be prohibited. In addition to privacy concerns, the non-public data should not be used for purposes other than those for which the information was collected (i.e., to administer the bankruptcy cases) for four reasons.[15] First, as discussed above in connection with certain items of public record data, disclosure of such non-public data may facilitate identity theft and other illegal conduct.

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[13] 11 U.S.C. § 341 (d) (requiring United States Trustees to "orally examine the debtor" in chapter 7 cases to ensure that the debtor is aware of certain consequences of seeking bankruptcy relief).

[14] 65 Fed. Reg. 46736.

[15] Some of the discussion pertains only to trustees who serve in a unique role in the bankruptcy context. To the extent, however, creditors and others involved in the bankruptcy process may gain otherwise unrestricted access to non-public data, they too should not be permitted to use it for purposes other than for which it was collected.

Second, trustees -- whether appointed from a panel to a particular case or appointed by virtue of their position as a standing trustee -- serve as trustees as a result of governmental action and receive sensitive private information from debtors as a direct result of their appointment as trustees. Trustees use this information to scrutinize and marshal the debtors' assets, determine the universe of existing creditors, and ensure that all available assets are liquidated for the benefit of those creditors. The use of such non-public information for commercial purposes appears to fall outside the scope of the trustee's responsibilities.

Third, it is well-established that bankruptcy trustees are fiduciaries and thus owe a fiduciary's duty of loyalty to the bankruptcy estate and all participants in the system.[16] These common law duties and principles remain viable today.[17] It is difficult to reconcile the common law prohibition against self-dealing with the commercial use of information that trustees obtain in their fiduciary capacity. It is also difficult to reconcile the commercial use of information obtained in a fiduciary capacity with the Department of Justice's recent rulemaking prohibiting standing trustees from using estate funds for their personal benefit.[18]

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[16] *See, e.g., Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 278, *reh'g denied*, 312 U.S. 716 (1941). The common law duty of loyalty prohibits any self dealing. *Mosser v. Darrow*, 341 U.S. 26 (1951).

[17] *United States Trustee v. Bloom (In re Palm Coast, Matanza Shores Ltd. Partnership)*, 101 F.3d 253, 257-58 (2d Cir. 1996); *Walsh v. Northwestern Nat'l Ins. Co. (In re Ferrante)*, 51 F.3d 1473, 1479-80 (9th Cir. 1995).

[18] *See* 62 Fed. Reg. 30171 (Final Rule Establishing Qualifications and Standards for Standing Trustees), codified at 28 CFR § 58.4. Given the common law prohibitions against self-dealing, one approach could be to require the trustees to certify in writing that (1) this sensitive information will be distributed on the same terms and conditions to all persons or entities and (2) that the trustees will not benefit from the dissemination of this information in any way, either directly or indirectly (including through any related or non-profit organizations). Such certifications would be consistent with those required by the Department of Justice when standing

Finally, the commercial sale of such information by a trustee may implicate concerns under the Fair Credit Reporting Act (FCRA).[19] Generally, the FCRA limits the disclosure by "consumer reporting agencies" of "consumer reports," information that is used or expected to be used as a factor in determining a consumer's eligibility for credit, insurance, or employment. Applicability of the FCRA would turn on several factors including examination of the purposes for disclosing the information as well as the actual uses of the information.[20]

Notwithstanding these considerations, if the bankruptcy trustees begin to use debtors' non-public information for commercial purposes or any purpose other than the administration of the debtor's bankruptcy estate, the debtor should receive notice of this use and be given some opportunity to choose whether to have their information used in such a manner.

D. Related Issues

Finally, the Study Agencies may wish to consider the interplay between consumers' privacy interests and the Bankruptcy -Code in the context of evaluating possible additional statutory changes. Traditionally, the Code vests a case trustee or a debtor in possession with sweeping powers to sell assets free and clear of liens and claims.[21] It is also well-settled,

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trustees submit their annual budgets or when standing trustees seek limited waivers regarding certain related party transactions. See, *e.g.*, 28 CFR § 58.4.

[19] 15 U.S.C. §§ 1681-1681u

[20] 15 U.S.C. § 1681a. It is also worth considering whether the Gramm-Leach Bliley Act, 15 U.S.C. §§ 6801-6809 (Subtitle A), which generally limits the disclosure of consumers' personal financial information by a "financial institution," might bear upon subsequent uses of such information.

[21] *See* 11 U.S.C. § 363

however, that a debtor or trustee in bankruptcy cannot take action in violation of extant law.[22] Recently, the Commission and various States have asserted that the sale of private customer information in direct violation of a company's privacy statement contravenes applicable law.[23] (We note that any governmental actions to exercise or enforce police and regulatory powers are exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).)

The interplay between these various interests is unsettled and involves competing considerations. For example, the more valuable the customer information is perceived to be, the greater the pressure on a bankruptcy estate to sell private information despite explicit pre-petition company promises to the contrary. The Bureau believes that the interplay of the Bankruptcy Code and law enforcement efforts to protect consumer privacy merit further in-depth analysis.

Conclusion

We are pleased to submit these comments. Please contact Jeanne M. Crouse, the Commission's Counsel for Bankruptcy and Redress, at (202) 326-33 12, if there are questions about our comments or additional information that we may provide to assist your efforts in this important matter.

Respectfully submitted,

/s/ Joan Z. Bernstein

Joan Z. Bernstein
Bureau of Consumer Protection, Director
Federal Trade Commission
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[22] 28 *U.S.C. $959.*

[23] *See, e.g., Federal Trade Commission* v. *Toysmart.com, LLC, et al.*, Civil Action No, 00-11341-RGS (D. Mass. filed July 10, 2000).

Earnhill, Leander

From: bk(u)tax(u)law [bk_tax_law@email.msn.com]
Sent: Sunday, September 24, 2000 2:20 PM
To: USTPrivacyStudy
Subject: Fw: Call for Comments on Administration Proposal on Bankruptcy and Privacy

I'm not sure if my original message was timely sent or not. If not and the record is still open, please include my comments 'chat follow.

James I. Shepard
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Bk_Tax_Law@msn.com
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From: bk(u)tax(u)law [mailto:bk_tax_law@email.msn.com]
Sent: Thursday, July 27, 2000 10:10 PM

Subject: Fw: Call for Comments on Administration Proposal on Bankruptcy and Privacy

Everybody in favor of closing all individual bankruptcy files from public examination to protect the debtor's privacy rights please commit yourself to the nearest asylum. The efforts of the debtors' advocates to create a perfect world for the debtors is beyond incredulity -- I find it difficult to take these people seriously, in this case they are stark, raving mad.

During the NBRC process one of the most common complaints from all creditors was inadequacy of notice. All of the details of which they are now complaining are required simply to give a creditor an opportunity to determine if they have a claim and, if so, what is the nature of their claim.

Governement creditors, in particular, are often left with insufficient information to determine the nature of a potential claim. The federal govt. has more than 100 agencies entitled to notice in bankruptcy. A notice sent to Janet Reno without other identifying information is meaningless. While modification of the Federal Bankruptcy Rules of Procedure would help, to date the Rules Committee has been indifferent with regard to the unique needs of government creditors, particularly state and local governmental agencies whose interests have been ignored.

Somehow these people must be made to understand that when a debtor files bankruptcy he or she waives any and all rights of privacy. Those that abuse the use of the information can be dealt with under some other law. The use of electronic filing and access to debtor data by the internet is an absolute necessity to modernize the entire system.

Before the
Department of Justice
Department of the Treasury
Office of Management and Budget
Washington, D.C.

COMMENTS
OF

THE INDIVIDUAL REFERENCE SERVICES GROUP

ON
FINANCIAL PRIVACY AND BANKRUPTCY

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Date: September 22, 2000

Introduction

The Individual References Services Group ("IRSG") welcomes the opportunity to submit comments to the Department of Justice, Department of the Treasury, and Office of Management and Budget ("agencies") on the study of financial privacy and bankruptcy.

The IRSG is composed of leading companies in the business of providing information that assists users in identifying and locating individuals. Members of the individual reference services industry offer unique access to databases of information, comprised in part from public record information, that are used for a broad range of socially beneficial purposes, including child support enforcement efforts, consumer protection, locating organ and bone marrow donors, locating missing pension fund beneficiaries and heirs, and real estate transactions. These services also assist in important governmental functions such as military recruitment, revenue collection, tracing fraud, apprehending criminals, and locating witnesses. Through the services offered by IRSG members, widespread dissemination of public record information continues to flourish for important and socially beneficial purposes.

As the agencies study the impact of bankruptcy filings on consumer privacy, the IRSG believes it is important to be mindful of the long-standing American tradition of open access to public record information and the critical role that this unfettered access plays in fostering transparency regarding the workings of government. In conducting this study, the agencies also should consider the broader implications that such a study may have on other public record systems. The many benefits that inure from the open flow of public record information generally **should** be reflected in the outcome of the agencies' efforts. In addition, it is important to appreciate the valuable contributions that the computerization of public records information has made toward this openness in government and furthering the public policy of dissemination of public record information.

To assist the agencies in their study, the IRSG sets forth below from its experience (1) a historical background of the treatment of public records generally in the United States and the social benefits that result from this treatment; (2) a description of the importance of public records, including bankruptcy records, in individual reference services; (3) a description of customers and the uses they make of individual reference services; and (4) the impact of technology on the availability and use of public records,

I. The Importance of the Open Flow of Public Record Information

Public record information plays an integral role in the American economy. The rapidly changing, highly mobile society at the dawn of the 21st century America makes it very difficult for government officials, companies, and individuals to find people and to verify information for important societal purposes such as crime prevention. Commercial public records services meet these needs.

The openness of public records is a well-cherished and uniquely American tradition. The right of access to government-held information is derived from statutes and constitutional guarantees: public access laws were designed to ensure the disclosure and dissemination of public record information. Our courts and policymakers long ago concluded that denying the public the right of access to information collected and maintained at taxpayer expense is repugnant to the spirit of our democratic institutions.

The openness of public record systems has co-existed with even the earliest notions of privacy rights. Moreover, the Constitution limits the options available to protect personal privacy when the information is part of the public record. For example, the constitutional guarantees of free speech and free press prohibit the government from imposing use restrictions on information in public records. The Constitution also reserves rights to the individual states, limiting the federal government's ability to force individual states to restrict access to public records.

State and local government agencies that make government records available for public inspection are a major source of information about government operations, corporations, and individuals. Court records are an example of information collected and maintained for public purposes, including dissemination to the public. Court records are an important element of the long tradition of keeping trial proceedings open to the public. Court records, which include judgments, liens, and bankruptcy filings, today remain open for public inspection absent extraordinary circumstances requiring sealing of a particular record. The media, for example, has used court records to inform the public about questionable prosecutorial policies, low conviction rates, and fraudulent schemes requiring legislative attention.

The United States Supreme Court has observed that a key change since the time the Constitution was adopted is the means by which information about trial proceedings is disseminated: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."[1] Similarly, computerization has democratized access to court record information by making the information available to a far greater audience.

With respect to public records involving bankruptcy, the Supreme Court has further observed that "knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation."[2] As Justice Brennan stated:

> Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," is an important part of our public discourse. [T]he choices we make

[1] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[2] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S 749, 789 (I 985).

> when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us. [E]nsuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[3]

II. Socially Beneficial Uses of **Public Record Information**

Public records databases are integral to a wide range of valuable private and public sector functions. The examples set forth below demonstrate the types of socially beneficial uses that result from the availability of commercial public record databases. These databases:

- are a valuable tool in fighting crime. A wide array of law enforcement agencies use public records databases to verify identities, locate assets, and locate witnesses to crimes, among other things. Similarly, the private sector and public sector use public record information to *prevent* crimes such as identity theft and fraud against the government.

- assist the EPA in identifying and locating polluters who were actually responsible for environmental hazards, and obliging them to bear the costs of remediation.

- play an important role in child support enforcement. For example, the Association for Children for Enforcement of Support (ACES), the leading non-profit child support enforcement organization, uses LEXIS-NEXIS databases to find the assets of "deadbeat" parents who owe child support, Approximately 85% of ACES' clients are mothers on welfare.

- play a valuable role in the economy by permitting businesses and government agencies to perform cost-efficient due diligence to confirm the financial viability and licensing of potential business partners/contractors.

- assist government in accurately and fairly distributing government benefits and unclaimed assets, and executors of estates in locating missing heirs entitled to inheritances.

- are an important tool for the media and public interest groups investigating government inefficiency, corruption, and discrimination.

[3] Id. at 787-88. 91

III. Uses of Individual Reference Services

Many of the benefits of public record information result from the use of individual reference services. Users of IRSG services are growing ever more reliant on the efficient, &fordable flow of information. These users' abilities to effectively perform their respective tasks are heavily dependent upon unfettered access to this information. The IRSG members are important suppliers of data for these users and, as such, access to and use of this information that is unencumbered by onerous requirements is critical to enabling the beneficial uses that inure from the use of public record information.

Individual reference service providers typically obtain public record information from a supplier who has collected and compiled it. The information is in turn used to create individual references service products for distribution. For instance, Database Technologies, Inc, a wholly owned subsidiary of ChoicePoint, Inc. has a Bankruptcies, Liens & Judgments product database. This product provides access to several different databases containing public record information obtained Ii-om state and local governments. Thus, Bankruptcies, Liens & Judgments allows a customer to search more than one public record database with a single search request. Providers of individual reference services make the information obtained from public records more precise by combining it with publicly available information or non-public sources.

We set out below illustrative examples of the types of uses that customers make of public record information.

Locating Assets and Persons: Most customers of individual reference services are members of the legal community, businesses, private investigative agencies, or government agencies. Members of the legal community use public records databases of individual reference service companies to locate assets, and to serve parties and witnesses. Such databases also can assist lawyers in their efforts to enforce judgments and locate heirs to estates. For these reasons, individual reference services are critical to members of the legal community, including established and well-respected law firms and process servers.

Due Diligence: Other customers include businesses that use individual reference services to conduct "due diligence" prior to a company merger. A business conducting this type of research could use these services to verify corporate records and identify officers or general partners. In addition, businesses use individual reference services to prevent and detect fraudulent activity by, for example, verifying addresses prior to delivering merchandise or credit cards. These services also are used to locate business debtors to assist businesses in their collection efforts.

Specifically, the ability to access bankruptcy records through commercial database services provided by IRSG members serves an important function in our credit economy. Bankruptcy records are used by individuals and businesses to protect their financial interests. For instance, bankruptcy practitioners use these records to monitor dockets, access filings, and prepare for cases Because bankruptcy filings often can have an impact beyond state and jurisdictional lines, access to records through individual reference service databases is critical to

ensuring that this information is accessible to a far greater audience. Access to bankruptcy records also is important to out-of-state creditors' efforts to protect their interests. Although creditors receive notice of a bankruptcy filing, creditors are able to obtain greater detail surrounding the circumstances of the filing through access to court records using an online system.

With the emergence of Internet start-up companies in the "new economy" and their efforts to raise venture capital, businesses also have become frequent users of bankruptcy public record products offered by individual reference service companies to perform due diligence. In making decisions to invest in a particular entrepreneur, investment banking firms investigate the financial history of the principal to determine whether the individual has ever been named as a party in a bankruptcy lawsuit.

Accurate Reporting of Bankruptcy: In the context of bankruptcy records, individual reference services are particularly important to prevent misidentification of individuals. In addition to affording access to public records, individual reference service products allow for critical linking across records, which enables users of these services to identify individuals accurately and to distinguish between individuals. A current search in one of LEXIS-NEXIS's people locator products reveals that there are more than 49,350 "Robert Smiths." In New York alone there are still over 2,700 Robert Smiths. Individual reference service products enable users (1) to identify whether Robert Smith is involved in a bankruptcy case and (2) to distinguish between the different Robert Smiths. Information from public records, therefore, is an important tool in preventing the misidentification of individuals, particularly from records about events such as bankruptcy.

IV. Impact of Technology on Access to Public Records

America has a long tradition of open access to public record information. Indeed, public record information is by its very nature readily available at government offices, and provides important transparency regarding the workings of government. Computerization of public record information has simply made access less costly and more convenient. Through a professional who has access to individual reference services, ordinary citizens are now able to obtain records from other jurisdictions without travelling or hiring someone to travel to the jurisdiction to inspect records. However, such access has not altered the important social function of open access to public records.

To the contrary, converting public records to digital media and distribution of this information through public record information services has helped to democratize the availability of public record information, furthering the long-standing public policy of dissemination of such information. Public record information services often provide faster access to that information in formats demanded in the market, combine it with information from various other sources for quick reference, ensure its reliability and integrity, and offer customer support and other assistance in using the information. These services bring more information by and about government to more members of the public every day, so that a central goal of effective democracy-an informed citizenry-can be achieved.

V. Conclusion

The openness of public record systems has co-existed with even the earliest notions of privacy rights. The IRSG looks forward to continuing to work with your agencies as you further study these important issues to ensure that the appropriate balance is struck between the free flow of information for important and socially beneficial purposes and protecting individual privacy.

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September 22, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
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Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

This comment letter is filed on behalf of MasterCard International Incorporated ("MasterCard")[1] in response to the request by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the "Agencies") for public comment in connection with their study of financial privacy and bankruptcy (the "Study").

The Agencies have been tasked by the President to study "how best to handle privacy issues for sensitive financial information in bankruptcy records." Mastercard appreciates the opportunity to present our views on this matter, and we applaud the Agencies for recognizing, as part of the Study, the needs of many parties for continued access to financial information in personal bankruptcy cases.

[1] Mastercard is a membership organization comprised of financial institutions which are licensed to use the Mastercard service marks in connection with payment systems, including credit cards, debit cards, smart cards and stored-value cards.

Background

As the Agencies are aware, individuals who file a case under Chapter 7 or Chapter 13 of the Bankruptcy Code (the "Code") must provide important financial information as part of their petition and schedules fled with the bankruptcy court. Section 107 of the Code requires all documents filed in a bankruptcy case to be "public records and open to examination by an entity at reasonable times without charge."[2] This includes information a debtor lists on the bankruptcy petition and the accompanying schedules. The law therefore requires items such as a debtor's name, address, Social Security number, creditors, account numbers, amounts owed, lists of assets, and income and expense information to be made available to the general public.

It is generally understood that section 107 "codifies the public's general right under common law to inspect and copy public documents."[3] Although Congress codified the traditional common law right to examine information relating to a judicial proceeding, Congress also recognized the risk of requiring sensitive information to be made public. Congress was quite specific, however, in identifying those circumstances when the public's right of access to information filed in a bankruptcy case can be overridden by the need to protect sensitive information. In this regard, section 107(b) grants the bankruptcy courts the ability to protect information "with respect to a trade secret or confidential research, development, or commercial information" as well as "scandalous or defamatory matter" contained in a bankruptcy case file.[4] Therefore, unless a party in interest, or the bankruptcy court itself, can demonstrate that information filed in a bankruptcy case falls within one of these exceptions, information must be made available to the public.

There are at least three categories of private sector parties who must have the right to access bankruptcy information: (i) creditors and others whose interests are affected by the debtor's bankruptcy case; (ii) creditors and other businesses who may consider doing business with the debtor; and (iii) the general public and its representatives.

The Need for Access to Bankruptcy Information

Bankruptcy provides extraordinary relief to debtors. The Bankruptcy Code enables a consumer, who has voluntarily entered into a legally binding agreement for the

[2] 11 U.S.C. 107(a) (1999).
[3] 2 Collier on Bankruptcy ¶ 107.02. (Lawrence P. King ed., 15" ed. 2000).
[4] 11 U.S.C. 107(b) (1999).

purpose of borrowing money from a lender, to invoke a federal statute to eliminate the consumer's obligation to repay that debt. By merely filing for bankruptcy, the consumer automatically obtains a stay which immediately prohibits the lender from even attempting to collect the debt. This relief is provided virtually on demand — one of the only things the debtor must do to obtain the relief is to file the information detailing certain aspects of the debtor's finances. This information is essential to creditors (and others) who must use the information to determine whether and how to participate in the bankruptcy case. Indeed, this information filed by the debtor typically provides a creditor the primary basis for concluding whether it is entitled to any recovery from the debtor before the creditor's rights are forever terminated. As a result, it is imperative that no restrictions be imposed on the ability of a creditor to obtain bankruptcy information where that creditor's rights are affected by the bankruptcy case.

The full range of bankruptcy information also is important to creditors (and other businesses) who need to consider that information in assessing financial and other risks. For example, Congress has consistently recognized the need for creditors to have access to data related to bankruptcy as part of fair and accurate risk assessment.[5] Bankruptcy courts themselves have echoed this sentiment which has been articulated as follows:

> A bankruptcy filing is highly pertinent information to commercial enterprises . . . . Businesses must make daily decisions about entering into credit transactions with members of the public. The legitimate financial interest of businesses will be frustrated if the filing of a bankruptcy case is maintained on a confidential basis. The need of the public to know of the filing of the bankruptcy case . . . outweighs the debtors' desire to avoid the embarrassment and difficulties attendant to the filing of bankruptcy.[6]

As the Agencies consider various proposals in connection with the Study, it is essential that the Agencies ensure that no changes are adopted that would limit the type or compromise the quality of bankruptcy information that creditors and other businesses are entitled to receive.

While creditors and other businesses must have access to bankruptcy records in order to conduct business in a safe and sound manner, the general public also must have access to bankruptcy information as a more fundamental principle of our form

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[5] See 15 U.S.C. 1681(a)(1), 1681c (1999).
[6] In re Laws, 1998 WL 541821, at *715 (Bankr. D. Neb. 1998). See *also* In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994), Simmons v. Deans, 935 F.2d 1287, 1991 WL 106160 (4th Cir. 1991).

of government. Our judicial system is based on a combination of common law traditions with rights and procedures guaranteed by our Constitution. Public access to the workings of the judiciary is a critical component of the system, acting as both a monitor on the judiciary and a method to retain the public trust in the judicial system. In fact, the United States Supreme Court has recognized the public's general right "to inspect and copy public records and documents, including judicial records and documents."[7] In so doing, the Court specifically stated that a "citizen's desire to keep a watchful eye on the workings of public agencies" is legitimate grounds to grant access to public records under the common law.[8] Furthermore, the Supreme Court has also relied upon the First Amendment to ensure public access to judicial records, noting that the First Amendment's "guarantees of speech and press . . . prohibit government from summarily closing courtroom doors which ha[ve] long been open to the public," which ensures a public trust in the judicial system and public affairs.[9]

To ensure that these objectives embodied in our common law as well as the Constitution are met, the information the debtor files to justify obtaining bankruptcy relief must be made available to the public. Only if the public has access to that information can confidence in the fairness of the system and the propriety of the relief be established and maintained. This means that the information must be available to researchers, scholars, policy makers, and any other member of the public who may wish to access it for their own purposes.

Use of Identifiers

The Agencies have specifically requested input on the use of identifiers in bankruptcy cases, such as account numbers and Social Security numbers. These identifiers are critically important and must continue to be available so that those who are attempting to determine whether a particular bankruptcy case relates to a specific individual are able to do so. For example, making the account number and Social Security number available is critically important so that creditors can close the correct account and ensure that it cannot be used again by the debtor *or* anyone else.

Other more basic identifiers, such as name and address, simply are not reliable enough by themselves. As a result, restriction on the availability of consumer identifiers will harm consumers. A common problem that occurs when identifiers such as Social Security numbers are unavailable is that one consumer's information is

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[7] Nixonv. Warner Communications, 435 U.S. 589,597 (1978).
[8] *Id.* at 597-98.
[9] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

erroneously associated with a consumer who has a similar name. Use of the Social Security number generally is the only way to avoid this problem. Restrictions on access to the Social Security numbers of debtors filing for bankruptcy will virtually ensure a new increase in instances where the bankruptcy filings of some debtors are erroneously associated with consumers who have never filed for bankruptcy.

Access: The Role of Intermediaries

It is important to recognize that many intermediaries play a key role in ensuring that bankruptcy records are made available in an efficient manner. For example, public record retrieval companies gather many types of public record information, including bankruptcy records, and make the information available more efficiently than can be achieved through other retrieval mechanisms. In this regard, bankruptcy courts themselves generally do not have the resources to efficiently respond to requests from every patty who may be interested in viewing each bankruptcy case, Public record retrieval services have been invaluable in addressing this problem, and it is essential that they continue to have full access to bankruptcy information.

Consumer reporting agencies play a similar role in that they obtain bankruptcy information and include it in credit reports used to evaluate consumers for credit and other products, In order to manage credit risk, creditors rely on information provided by consumer reporting agencies when evaluating a consumer's application for credit. It is absolutely necessary that a consumer reporting agency have access to complete and up-to-date information. In this context, Congress has specifically noted that creditors are "dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system.[10]" Therefore, in order for our system of banking to continue to operate appropriately, consumer reporting agencies must continue to have access to all information fled in a bankruptcy case.

Conclusion

Congress recognized the importance of making bankruptcy information publicly available when it enacted the Bankruptcy Code in 1978. This information is critically important to those who are or may be affected by a debtor filing for bankruptcy. The information also must be made available to the general public as a fundamental principle of our judicial system as established under common law tradition and the Constitution. Judicial records and documents simply must be available to the public in order to ensure the fairness and reliability of the bankruptcy system itself.

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[10] 15 U.S.C. 1681(a)(l)

We also acknowledge, however, that consumers should be aware that information they file with the court in connection with a bankruptcy proceeding will be made publicly available. We believe consumers should be advised of this fact by counsel (or the court) when filing for bankruptcy. If, as a result of this Study, however, the Agencies fmd that debtors are not informed that information filed with the bankruptcy court will be made publicly available, it may be appropriate that debtors receive notice from the court, as part of filing the bankruptcy petition, informing them that all information filed with the court will be made publicly available. We also recognize that certain information provided as part of a bankruptcy case may be so sensitive as to constitute a trade secret or information that is "scandalous or defamatory." In these circumstances, the court must continue to have the ability to prevent its release to the public so long as those parties with an interest in the proceedings have access to the information. This protection, however, must be administered only on a case-by-case basis after careful deliberation. It must not be used as a means to thwart the basic principle that the bankruptcy records are open to the public and, in any event, must not be used to prevent public access to the debtor's-financial information and related identifiers.

* * * * *

Once again, MasterCard greatly appreciates the opportunity to provide our comments with respect to the Study. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley & Austin, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Noah J. Hanft

cc: Joshua Peirez (Mastercard International)
Michael F. McEneney (Sidley & Austin)

American Financial Services Association

September 22, 2000

Mr. Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E. Street, NW
Suite 789
Washington DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

The American Financial Services Association ("AFSA")[1] appreciates this opportunity to respond to the request for comment on Financial Privacy and Bankruptcy by the Department of Justice, the Department of Treasury, and Office of Management and Budget (the "Agencies") published in the Federal Register on Monday July 3 1, 2000. The President has directed the Agencies to study "how best to handle privacy issues for sensitive financial information in bankruptcy records. "

AFSA and its members have long recognized that bankruptcy increases credit prices. Unrecoverable principal and interest is one reason, but equally significant are the costs for creditors to monitor and participate in bankruptcy proceedings and maintain programs to assure compliance with restrictions like the automatic stay, turnover, redemption, cramdown, and the post-discharge injunction. The recent increase in bankruptcy filings has caused these monitoring, participation and compliance costs to increase dramatically. For this reason, AFSA supports efficient and low-cost access to accurate and complete information about (1) who has filed bankruptcy, (2) their financial information, and (3) the trustee's administration of the case.

AFSA is an association whose membership includes over 300 consumer credit lenders. AFSA members rely primarily upon capital markets to fund their receivables, and include automobile lenders and lessors, mortgage lenders, retail lenders and credit card companies,

[illegible] N.W., Washington, D.C. [illegible] Telephone: (202) [illegible] Fax: (202) [illegible]

The amount and nature of information a debtor filing for bankruptcy protection provides has not significantly changed for many years. However, in the last 5 years there have been significant increases in the efficiency with which information about bankruptcy cases is made available. There have been three main official initiatives. First, most courts, through PACER or otherwise, make the docket of cases available on line. Second, a few courts have initiated electronic programs under which the petition, schedules, and other docket items are available on line. Finally, the Chapter 13 trustees have initiated programs under which their case administration information is or will be available on line. Because of the need for bankruptcy information, private information retrieval companies have filled in the gaps, developing on-line or telephone availability of bankruptcy information on a fee-for-service basis. All together, these changes have begun to increase the efficiency with which information about bankruptcy proceedings is available, and if allowed to continue, should result in significant improvements in the ability of those parties/creditors affected by bankruptcy proceedings to obtain the information they need in order to comply with its restrictions and participate effectively in cases.

However, there are those who criticize these developments, and raise concerns about their impact upon debtor privacy. A small group of critics has urged restrictions on the way personal and financial information is collected and made available in bankruptcy proceedings, with different levels of concern for the social security number, addresses, credit account numbers, income and expense figures, and assets and liabilities. A few have even gone so far as to suggest that information provided in adversary or contested matters be subjected to restrictions.

Discussion

In bankruptcy, the federal government removes from creditors the right to enforce obligations the debtor owes them, and prefers certain creditors over others. As a result, wealth is transferred from creditors to debtors and among creditors without compensating those who lose out!, presumably to accomplish certain social goals.

Historically, it has been accepted that in exchange for the wealth transfers the federal government mandates on their behalf, debtors are responsible to disclose fully to creditors and the public their complete affairs, including their assets and liabilities, their creditors and other obligees, their income and living expenses, and their financial transactions during the period before bankruptcy. The purpose of the disclosure is threefold:

- To permit creditors and other interested parties whose obligations may be adversely affected to protect their interests and participate effectively.

[2] Because the bankruptcy power is recognized in the federal Constitution and for other reasons, the federal courts have found that this taking from creditors is not a "taking" requiring compensation under the Constitution.

- To encourage creditors, other interested parties and the public to detect improper or fraudulent use of bankruptcy. Because it can so significantly reduce a debtor's legal obligations, bankruptcy provides the opportunity for the unscrupulous debtor to misuse the process. Over the years, scrutiny by creditors and the public has been relied upon to deter and detect improper use and fraud, rather than a much more expensive governmental enforcement system.

- To assure public oversight and confidence in the bankruptcy system, which, if it operated in secret, might well appear arbitrary and corrupt.

Thus, it has been a fundamental principle of bankruptcy administration that information a debtor provides in the course of a bankruptcy proceeding must be freely available to creditors, other involved parties, and the public to support the proper functioning of the bankruptcy system and to assure public support for the extraordinary remedies bankruptcy provides. That fundamental principle is recognized in section 107 of the Bankruptcy Code, which requires open access to any papers filed with the court, subject to, upon specific request of the debtor, certain listed exceptions covering confidential business information and scandalous matter. The right of access to bankruptcy information is also recognized in the Bankruptcy Rules.[3] Thus any change to the public availability of court records would, at a minimum, require statutory and Rule changes, as well as satisfaction of constitutional requirements.

By practice, trustees have made information they collect available to those who inquire, recognizing the open and public nature of a bankruptcy proceeding and their fiduciary duties. Changing the trustees' practices would likewise require statutory change.[4]

At its core, the President's charge to the Agencies raises whether the fundamental principle of open public access to the records of bankruptcies is outweighed by the private nature of the information recorded in those records. AFSA's members are concerned about the protection of confidential financial information, both from the perspective of their customers and since they must bear the cost of any fraudulent misuse of such information.

However, practical means to accommodate both those concerns and the needs of the bankruptcy system are not available. Critics of the present system have suggested changes such as no longer requiring certain information like the social security number or credit account numbers, restricting availability of sensitive information only to identified "creditors" or "parties in interest" and excluding the public, or limiting or discouraging the availability of bankruptcy information over the internet. As explained below, any of these restrictions on

[3] Fed R. Bankr. P. 1007(a), (b) (petition and schedules filed with the court). With respect to adversary and contested matters, see Fed. R. Bankr. P. 5005(a)(traditional filings), (b)(electronic filing), 7003, 9014, 9018 (requiring filing with the court and providing for exclusion from the public record in certain situations).

[4] The trustees, as functionaries of the bankruptcy court, are not "agencies" subject to the Privacy Act. 5 U.S.C. §552(e). Instead, statute, rules issued by the judiciary, and case law set their duties. See 11 U.S.C. §§ 704, 1302.

open public access to bankruptcy court and trustee records would adversely affect the system's ability to provide --

* debtor benefits such as the automatic stay and post-discharge injunction;

- adequate information so that those affected by bankruptcy can comply with its restrictions and protect their financial and property interests; and

- assurance to the general public that the bankruptcy system, with its unique legal rules and relatively wholesale forgiveness of debt, is operating fairly and deserves continued support.

In addition, the requirements of the United States Constitution significantly limit any attempt to make bankruptcy information inaccessible to creditors, other affected parties or the public; or to require creditors and others to comply with restrictions, such as the automatic stay and post-discharge injunction, without giving them adequate information from court and trustee records needed to protect their interests and comply with the restrictions.

Other, less restrictive means of regulation, such as disclosing to debtors that information they provide on the petition is publicly available, may be beneficial. However, the cost of effecting and administering the disclosure should be weighed against the fact that most if not all debtors understand that the information they put in papers filed with a court of law are public.

Thus, on balance, no **new** regulation restricting access appears to be appropriate in light of the substantial benefits debtors receive from bankruptcy and the needs of the bankruptcy system, those affected by it, and the public for access to the information the debtor provides.

The discussion below first addresses general constitutional and policy considerations which preclude the imposition of significant limitations on access to bankruptcy information. It then turns more specifically to the debtor's social security number, other information the debtor provides that is placed in the court record, information the trustee obtains or develops during administration of the case, and certain other considerations.

I. General Considerations

A. The First and Fifth Amendments seriously constrain any effort to restrict who can have access to bankruptcy court records.

It is well established that the First Amendment of the Constitution mandates that the press and public have open access to court records, absent special compelling circumstances.[5] Although some have tried to argue that bankruptcy court records, or at least the petition and schedules, are not "really" court records and therefore not afforded First Amendment protection, or

[5] ***Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565-74*** (1980); ***Gannet Co., Inc. v.*** *Depasquale*, ***443*** U.S. 368, 387-91 (1979); and ***Cox Broadcasting Carp. v. Cohn, 420*** U.S. 469, 495 (1975).

otherwise tried to avoid the force of this argument", it is unassailable that bankruptcy is a judicial proceeding and that that the petition and schedules have always been considered records of the bankruptcy court. Any effort to limit or restrict access to these records by those affected will require legislative changes[7] and is unlikely to pass constitutional scrutiny under the First Amendment.'

But if there were any doubt as to the First Amendment's requirements in this context, the Fifth Amendment right to due process also mandates that at least creditors and other parties affected by the bankruptcy process be able to access the information they need to protect their interests and comply with bankruptcy law mandates like the automatic stay.

As stated by the Tenth Circuit Court of Appeals:

> "A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the [bankruptcy] process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests. "[9]

In this day of vastly increased bankruptcy filings", consumer creditors of any size often receive multiple bankruptcy notices each business day. If those notices did not identify the debtor in a way that allowed the creditor to determine that a particular notice was for a certain customer, the creditor would not have received effective notice since the creditor cannot

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[6] Two challenges to First Amendment protection of bankruptcy court records (and particularly the schedules) have been advanced: (1) Supreme Court precedent to date has dealt only with criminal cases. Some who urge that access to bankruptcy records be restricted have claimed that the right of access applies only to criminal cases, a position the Supreme Court has not adopted. As the Court has observed, the underlying reason for constitutionally required access to court records of criminal proceedings has been the need to permit public oversight of the exercise of governmental power. To those owed money by the debtor, the government's exercise of its power to make a formerly legal debt unenforceable is arguably as intrusive as the exercise by the state of the power to punish behavior, which often results only in fines. The lower courts that have addressed the issue apply the First Amendment to require open public access to bankruptcy court records. See, e.g., In ***re Symington, III, 209*** B.R. ***678, 694*** (Bankr. D. Md. 1997); ***and In re Astri Inv. Manag. & Sec. Corp.,*** 88 B.R. 730, 736 (D. Md. 1988). (2) The Supreme Court cases to date have stressed the right of the public to obtain information from court records. Those urging restrictions on access have claimed that at least ***creditor*** access can be restricted since creditor access to the records does not vindicate ***public*** oversight of the exercise of governmental power. However, it would be anomalous to allow the public to have access to court records and not creditors, particularly since creditors in a bankruptcy system are relied upon to uncover improper conduct, as discussed below, and have a vested interest in the property affected by te bankruptcy. ***See Cox Broadcasting Corp. v. Cohn, supra*** at 495.

[7] 11 U.S.C. § 107 (requiring public access to court documents unless otherwise restricted by the court).

[8] There are well recognized exceptions for unique situations in which a court orders that particularly sensitive information be subject to restrictions on public disclosure. ***See, e.g., Nixon v. Warner Communications, Inc., 435*** U.S. 589, 597-98 (1978).

'Reliable Elect. Co. v. Olson Const. Co,, 726 F.2d ***620, 623*** (10"' Cir. 1984).

[10] While filing rates have recently dropped slightly, informed opinion is that they will take off in the 4th quarter of 2000 and increase rapidly in 2001. See SMR Research Corporation, ***Bankruptcies Will Rise Strongly in 2001: Research Firm Predicts "Flood of*** Filings " (September 21, 2000)

determine whether its interests are actually at stake." As a practical matter, effective notice requires that the social security number be on the notice, as is presently the case. It also requires that affected and potentially affected parties have access to the official court record. Often creditors and other affected parties learn of a bankruptcy informally. They may only receive the official notice much later, or not at all. When informally notified, they act at their peril if they do not cease collection efforts. [12] Therefore, they need access to the court record to verify that in fact a bankruptcy has been filed, and, today, they do so by checking the official court record which shows the debtor's name, address and social security number. A similar reliance on the social security number occurs when creditors first learn of the bankruptcy from the official notice. By using the social security number and other information in the public record, they can determine whether their customer (as distinct from others with similar names) is the one who, in fact, has filed. It follows that access to that information is necessary for effective notice, and constitutionally required as a matter of due process.

By extension, if a creditor received notice, but could not gain access to the information in court records which allowed it to understand how the bankruptcy was likely to affect its rights and evaluate how it might effectively protect them, due process would not be satisfied because the creditor would not have had a real opportunity to prepare and present its case.

Given the limitations imposed by the First and Fifth Amendments, imposition of restrictions on open public access to bankruptcy court records is not, as a practical matter, an achievable outcome, assuming it were desirable. But even if the Consititution did not impose these rest&ions, in a democratic society relying, as does ours, on checks and balances to constrain governmental power, such restrictions would not be desirable.

It has long been established as a basic principle of fairness and a check on the judicial system that records of court proceedings must be on the public record, Governmental agencies often seek to be free from public scrutiny. However, our history teaches that when justice is administered and information relevant to the relief sought is kept secret, arbitrariness, injustice and abuse can result. On the other hand, public inquiry and criticism aid development of efficient and effective governmental programs. Similarly, injustice results when parties affected by a judicial proceeding cannot secure the information they need to fully represent themselves. These concerns, while usually clothed in the language of First and Fifth Amendment analysis, have behind them long-standing policies on which our democratic society has been based since its inception. It would-be unwise to abandon them.

[11] For example, a notice in the name of "Bob Jones" when the creditor lists 15 customers in that geographic area with that name.

[12] 11 U.S.C. § 362(a), (h).

B. The **bankruptcy system is built upon the assumption of open access to bankruptcy records, whether of the court or the trustee. Without such access, the bankruptcy system would not operate as intended.**

Bankruptcy has long relied upon the adversarial nature of the judicial process and the scrutiny of the public to control and regulate compliance with restrictions on bankruptcy relief. Without open access to the information the debtor provides, that function would be substantially impaired, negatively impacting the controls on which the bankruptcy system primarily relies to assure the integrity of the system. Significant and costly changes would have to be made to the bankruptcy system to assure its integrity, such as substituting a large bureaucratic oversight and monitoring presence in the bankruptcy process. Such a presence would be both intrusive to debtors and expensive. As a practical matter, Congress has always been reluctant to fund any such presence. Yet reductions in public and creditor access to bankruptcy information without a significant and effective increase in public enforcement and oversight would further erode confidence in the bankruptcy system.

Moreover, for many years, the bankruptcy system has assumed that creditors and other affected parties could protect their interests adequately during a bankruptcy, because they had complete access to the information the court and trustee had concerning the case. Restrictions on interested **party** access to information would seriously undercut that assumption, and require massive changes to the bankruptcy system in order to assure fair treatment of those adversely affected.

II. The Social Security Number

Critics of the present availability of bankruptcy information have focused much of their concern upon the social security number.[13] Some have suggested that the social security number no longer be required, while others have urged, variously that the number be available only to: (1) the trustee, United States Trustee ("UST") or bankruptcy administrator ("BA"); (2) to "creditors"; or (3) to "creditors" and "parties in interest." To avoid the First Amendment constraints, one commentator has even urged that the social security number be removed from the judicial record and held only by the UST, BA or trustee.[14]

However, abandoning use of the social security number as a means of identifying the debtor or limiting access to it would seriously impair the bankruptcy system, debtor relief, and public oversight.

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[13] Section 342 (c) in combination with Official Form 1, requires the debtor's petition to list the debtor's social security number, and requires that any notice given by a debtor to a creditor contain the taxpayer identification number of the debtor. The legislative history of the provision recognizes that "the court retains the authority to waive this requirement in compelling circumstances.. . . " 140 Cong. Rec. H10752, 10769 (daily ed. Oct. 4, 1994)(statement of Sen. Brooks).

[14] Leaving aside whether so blatant an attempt to avoid the First Amendment would fail on the grounds that it was a patent evasion of fundamental rights guaranteed by the Constitution, the Fifth Amendment's protection of due process would still require either that affected parties have access to the number or that they be relieved of the effects of bankruptcy when unable to identify the debtor as their customer.

A. The bankruptcy system cannot function as intended unless the social security **number continues to be required.**

The social security number is the only available unique identifier of individuals maintained in the United States. It is universally used by the government and by the rest of society to identify a particular individual for a whole series of purposes. It is the only generally recognized way to unequivocally identify a particular individual as one who has sought or received bankruptcy relief from the federal government.

At the outset, it is clear that important controls and limitations on bankruptcy relief would become, in effect, unenforceable if the social security number were no longer required and retained in the court records of the bankruptcy case. The bankruptcy system relies upon trustees, USTs, BAs, creditors and other parties affected by bankruptcy to enforce the limitations and restrictions on relief incorporated into it. Restrictions on filing frequency are a major limitation designed to control abuse of the system and the generous relief it offers. Yet trustees and other officials, creditors and other affected parties could not find and raise cases of multiple and serial filing, or repeat chapter 7 filings within the 6 year period of limitation, unless the social security number used in prior bankruptcies was available. Furthermore, since trustee records are not generally available for long after the final report is filed with the court, having the social security number available only there would effectively negate enforcement of the 6 year limitation on repeat chapter 7 cases. Moreover, the present bankruptcy system funds neither the UST, BA nor trustee adequately to make vigorous enforcement likely. Instead, it relies heavily upon enforcement by creditors and other interested parties, who would be effectively cut out if they could not obtain access to the social security number.

Without access to the social security number, detection and proof of a multiple, serial or repeat filing case is extremely difficult. **Debtors** can simply deny that they are the person who previously filed, requiring eyewitnesses (usually unavailable) to identify the debtor, or other testimony based on personal identification that this debtor was in fact the very same person who previously filed. Even if such eyewitness testimony were available, preparation and trial time would increase inordinately, seriously impairing enforcement. In some of the configurations in which multiple and serial filing is practiced, a creditor in a subsequent bankruptcy may not have been even a party in interest in an earlier bankruptcy.[15] Restricting access only to "parties in interest" would in such situations preclude detection and/or enforcement by those who were creditors in the later case, but not in the earlier cases.

[15] For example, the creditor may have loaned the debtor money to refinance an old loan that was paid off and not assigned to the new creditor (which is common in many types of refinancing).

B. Unless creditors and other affected parties have open access to the social security number, such remedies as the automatic stay and post-discharge injunction will not be effective, and creditors will be unable to comply with the restrictions and controls of the Bankruptcy Code.

One of the most important and expensive functions creditors perform in trying to comply with bankruptcy law is identifying a particular customer as one who has in fact filed bankruptcy. Name, address and financial information alone are not sufficient. Common surnames and debtor name changes are frequent and street addresses given on the petition often do not agree with those on creditor records. Even when they do agree, they are not reliable, since a child may have the same name as a parent or cousin, and in some areas of dense living conditions and high turnover, occupancy of the same or an adjacent apartment by unrelated people with similar names can occur. The listing on account records of a creditor's account number and dollar amount is not a reliable method of identification, since creditors often extend credit to those with similar names, and debtors' listing of amounts owed is often inaccurate.

The present bankruptcy system places a high premium on absolutely accurate identification of a particular debtor as one who has filed bankruptcy to protect the debtor, to permit the creditor to comply with bankruptcy restrictions on its conduct, and to allow the efficient and fair evaluation of credit worthiness. For example, a creditor's or credit bureau's ***incorrect*** conclusion that the debtor has filed for bankruptcy can result in denial of credit or termination of credit services. The creditor that ***incorrectly*** concludes a person has filed for bankruptcy also will incorrectly cease attempts to collect, adversely affecting the creditor's business. If, on the other hand, the creditor ***incorrectly*** concludes that a debtor is not in bankruptcy, collection will continue despite the automatic stay, harming the debtor and placing the creditor unnecessarily at risk for sanctions under section 362(h) for willfully violating the stay. [16] The accurate identification of co-debtors protected by the co-debtor stay[17] is also central to the protections the Bankruptcy Code is intended to provide.

If restrictions were imposed precluding some or all entities potentially affected by bankruptcy from access to the social security number, fairness as well as constitutional law would require that those entities be relieved from responsibility for complying with the automatic stay, turnover responsibilities and the discharge whenever they were unable to identify accurately their customer to a high degree of certainty as one who had filed for bankruptcy. Such a change would clearly reduce the value of the automatic stay, the discharge, and bankruptcy relief in general.

[16] Some courts hold that "willful" in section 362(h) requires only that the creditor intended to take the collection action, not that the creditor knew it was violating the law.

[17] 11 U.S.C. § 1301 (staying creditor collection against a co-debtor when a Chapter 13 is filed). .

C. The credit system cannot function **unless credit bureaus and other record retrieval agencies have access to the social security number.**

The efficient allocation of consumer credit, and its quick and widespread availability to every segment of society have long been goals fostered by Congress. Credit bureaus are recognized as the facilitators of efficient credit granting, and it is clearly a Congressional goal that the information they report be accurate. Whether an individual has filed for bankruptcy is clearly relevant to efficient granting of credit to consumers, and credit bureaus have long retrieved this information and reported it in the credit report.

In obtaining accurate information about debtors, credit bureaus rely primarily upon the debtor's social security number as the crucial identifier. It is obviously of the highest importance that credit bureaus obtain accurate information of this nature. It follows that they must have open access to the debtor's social security number.

D. Public record retrieval intermediaries and servicing and collection agents all must have access to the social security number if the credit underwriting and collections systems are to work efficiently.

Public record retrieval intermediaries such as bankruptcy information providers must be able to use the social security number to accurately relate a bankruptcy filing to a particular person. The information they obtain is relied upon by creditors and other participants interested in the **bankruptcy process,** and the availability of information from them increases the efficiency with which creditors can manage a growing number of bankruptcy cases. Information from these sources is particularly important to smaller creditors who cannot support a large bankruptcy management department.

Similarly, agents of the creditor such as servicers and collection agents add significiantly to the efficiency of loan administration, lowering creditor costs and credit prices. These parties require access to the social security number to effectively administer cases. They, like creditors, require accurate identification of an individual who has filed for bankruptcy or is otherwise protected (for example, a co-signer in a Chapter 13 case) in order to comply with such restrictions as the automatic stay and post-discharge injunction. Precluding them from access would clearly be counterproductive to the goals of the Bankruptcy Code.

E. Access to the social security number could not be restricted just to "creditors" and "parties in interest" without seriously impairing the fairness of the bankruptcy system, and the effectiveness of debtor remedies.

Some have proposed that access to sensitive information like the social security number be controlled by a "gatekeeper" who would check that the person requesting the information had a legitimate interest. However, any "gatekeeper" must be given explicit criteria to separate those that have a legitimate interest from those that do not. Such a standard is not available as

a practical matter. The "creditor" and "party in interest" categories are neither unambiguous nor sufficiently inclusive of those potentially affected by bankruptcy.

A debtor's bankruptcy proceeding extensively changes the rights and obligations of the debtor and those with whom the debtor has relationships concerning financial, contractual, property ownership, governmental and sometimes marital and family matters." Parties who are not considered "creditors" (and may not even be "parties in interest"[19]) are often affected, such as holders of executory contracts, custodians of property (subject to turnover obligations), tax collectors, enforcement agencies, potential new creditors," children not in the debtor's custody and,ex-spouses to whom no money is currently owed, and so on. Sometimes such information is legitimately sought by those parties that for strategic reasons do not want to participate in the bankruptcy proceeding and, therefore, do not want to identify themselves as creditors or potential creditors.[21]

For practical reasons, therefore, the "gatekeeper" approach is unworkable.

F. The general public must have access to the social security number in order to assure that accurate information about the bankruptcy system will be available.

Given bankruptcy's extraordinary effect upon a debtor's obligations, the public is legitimately interested in whether individuals have filed for bankruptcy. For example, recent public interest has been focused on individuals charged with securities fraud who harmed innocent investors and then filed for bankruptcy, as well as businessmen who have used bankruptcy following business **reverses while** exempting a valuable house and grounds. Reports of these cases have raised questions in the press about whether bankruptcy relief was appropriately or fairly available. Without public access to the information filed and the ability to identify the

[18] Given the broad effects bankruptcy can have on parties who are not technically "creditors" but have relations with the debtor, and the legitimate interests in the bankruptcy proceeding by those who are not listed creditors and have not filed an appearance, there is no *practical* way to limit access to bankruptcy information without unfairly excluding those who have a direct economic or personal interest in the proceeding, even if it were desirable to exclude the general public from such information.

[19] The Code uses but does not define "party in interest." Some consider the term to only include someone who has entered an appearance in the case, filed a proof of claim, or is a listed creditor. The phrase therefore has the potential to exclude many who have a legitimate need to know if the debtor has filed. For example, an ex-spouse not currently owed child support and formally "unaffected" by a Chapter 7 bankruptcy, but entitled to support in the future, may still want to learn about the bankruptcy in order to prepare for the worst. Others view the term as ambiguous, perhaps including virtually anyone, but perhaps excluding those such as the ex-spouse just described who do not have any present monetary interest at risk in the proceeding.

[20] Those who extend credit to a debtor during a Chapter 13 proceeding are subject to the claim that without the trustee's approval, they are not entitled to payment. See 11 U.S.C. § 1305 (allowance of post-petition claims for necessary debts arising after the date of the order for relief).

[21] Such parties are often concerned that an appearance or active role in the bankruptcy will result in a counterclaim by the debtor or trustee. Not appearing and not filing a proof of claim may also give a potential defendant jurisdictional advantages should a suit by the debtor or trustee be commenced against them.

filer as the person who was charged with fraud, reporting on these cases would be chilled.[22] In addition, imagine the impact on public confidence in the bankruptcy system if such stories were reported only as rumors, with the comment that bankruptcy processes were secret and whether the alleged perpetrator of fraud had obtained bankruptcy protection could not be verified.

III. The Debtor's Financial Information

Critics have urged that **access to** some or all of this information be restricted. In particular, there has been concern with access to credit account numbers, but there has also been expressed concern that in the schedules the debtor must disclose assets, liabilities, income and expenses, family size, and expenditures of a sensitive nature, such as charitable contributions.[23] However, without access to such information, creditors and other affected parties could not identify the accounts debtors are discharging or how to participate in the case so as to protect their interests, nor can the public evaluate how well bankruptcy is performing.

A. Creditors and other affected parties cannot be excluded from access to debtor financial information.

Without access to debtor financial information, creditors and other affected parties cannot adequately evaluate their position, either as against the debtor or in relation to other, competing creditors. They cannot determine whether to object to exemptions, seek lift stay or a section 707(a) or (b) dismissal motion,[24] or in some instances even whether and how to prepare a proof of claim.[25] In a Chapter 13 proceeding, it is almost impossible to understand a plan without access to the schedules. The information required in the petition and schedules **has been** developed over the years so that creditors can, by reviewing the schedules, fairly evaluate their position **and** adequately pursue their interests, which bankruptcy has the effect of seriously impairing.[26]

The **sweeping** nature of bankruptcy relief means that many people and entities are affected by it. Unless they can obtain accurate information about the debtor's financial position, and

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[22] Use of the debtor's name and address as the only identifiers would risk significantly inaccurate reporting because of the frequency with which different people have the same name and the inaccuracy of the address as an identifier

[23] In fact, the petition and schedules can be prepared without disclosing the charitable recipients unless contributions have been made within the fraudulent conveyance period. Since such transfers have not been voidable since 1998, the Statement of Affairs might be rewritten to permit omitting the exact name of the recipient.

[24] Some circuits have held that creditors can bring appropriate section 707(b) cases to the attention of the United States Trustee or bankruptcy administrator and participate in them, although creditors cannot bring such motions on their own.

[25] Part of preparing a proof of claim is to assess whether filing the claim will engender a countersuit or preference action.

[26] See discussion, *infra* Part I, of the requirements of Fifth Amendment due process that an affected party be able to have access to information sufficient to protect the interests the government otherwise would adversely affect.

relationships with all of his or her creditors and other significant parties, they are precluded from effectively protecting their economic interests and property rights.

B. Credit bureaus, public record intermediaries, servicing agents and collection agencies must have access to this information.

Moreover, credit bureaus, public record intermediaries (such as bankruptcy information collection agencies), and those entities which provide collection services to creditors (like servicing agents and collection agencies) require this information to assist both those creditors whose interests or property are involved in the bankruptcy, and those creditors who might in the future consider extending credit or enter into other transactions with the debtor.

C. The public and press must have access to this information in order to provide oversight of the bankruptcy process and maintain public confidence in it.

As previously discussed in connection with the social security number," bankruptcy's extraordinary effect upon a debtor's obligations makes public scrutiny of the bankruptcy process legitimate. As the Supreme Court stated in *Cox Broadcasting,*

> . . . [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us. . .would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. . . .The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[28]

Moreover, the need to maintain public confidence in the bankruptcy system as a practical matter requires that bankruptcy proceedings not be carried on in secret. Public discussion of both individual cases and the bankruptcy system in general are valuable because it builds public acceptance or encourages improvements.

IV. Trustee Information

Although in Chapter 7 no-asset cases the trustee, UST or BA often have little information, in an asset or potential asset Chapter 7 case or Chapter 11, 12 or 13 cases, these officials often

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[27] See ***infra*** Part II, F.

[28] ***Cox Broadcasting Corp.*** v. ***Cohn,*** supra at ***491-2, 495.***

have considerable information about the debtor's financial affairs and ability to pay, and, in the case of Chapter 12 and 13 proceedings, plan performance. For those potentially affected by a bankruptcy, this information is extremely valuable, for example, to assess the likelihood of a dividend being paid, whether relief from stay should be sought and whether a Chapter 11, 12 or 13 plan should be supported or opposed. In Chapter 12 and 13 cases, the trustee is the person usually most informed about the debtor's plan and its performance. In particular, ***only*** that trustee has the information to determine if the debtor is current on payments. to the trustee mandated by the plan, or the amount the trustee considers to be still owing a creditor under the plan. Chapter 13 payment tracking is a major function of any creditor with a substantial interest under a Chapter 13 plan. When the scheduled payments from the plan are not received, the creditor must determine whether the debtor is in default on the payments to the trustee, the amount of the default, and if the trustee has taken steps to require cure. This information is used to determine whether to seek relief from stay, or conversion or dismissal, When a debtor dismisses or converts a Chapter 13 plan, or proposes a payoff, the creditor must determine how much it is still owed, requiring review of the amounts paid as determined by the trustee.

For those actually or potentially affected by the debtor's bankruptcy (whether technically creditors or not), this information is, at the least, just as important as the public record information available in the court files. Unless such information is openly available to those interested in the bankruptcy proceeding, they will be seriously obstructed in determining what steps, if any, they need to take to protect their interests. Efforts to curtail access to this information would interfere with the fiduciary responsibilities trustees owe to creditors, including the fiduciary obligation to keep them informed about the course of the bankruptcy.

The general public likewise has an interest in monitoring how well trustees are carrying out their responsibilities under the Code. Such monitoring and oversight would **be** meaningless if information about individual cases were not available. How can you access how well a system is working if you cannot obtain information on how well it administers specific cases?

V. Other Considerations

A. There is no reliable evidence of quantifiable harm to consumers from the present availability of bankruptcy information.

We are aware of no evidence of extensive abuse under the present system of the availability of bankruptcy information, either held by the courts or by the trustees. Unlike other areas where harm has resulted from the lack of privacy, in bankruptcy, the lack of privacy has not been deleterious to debtors. In fact, because they make their financial information available, the bankruptcy system is enabled to provide them with prompt and effective relief.

Some commentators have suggested hypothetically that information in bankruptcy records, and particularly the social security number, might be used for the purposes of identity theft or other fraud. Identity theft in the case of a person who filed bankruptcy is highly unlikely because

the economic incentives for such theft are not there. The thief cannot obtain significant credit extensions in the name of one who has filed for bankruptcy. Moreover, the higher level of underwriting scrutiny of those who have passed through bankruptcy brings with it a degree of investigation a thief seeks to avoid.

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Other commentators have urged that credit grantors might use bankruptcy information to market to debtors who have just received a discharge, or to determine candidates for redemption financing or home equity take-outs from Chapter 13 proceedings. The market for such credit is extremely specialized and extremely small. Only approximately 1.3 million consumer bankruptcies were filed in 1999, and while bankrupt debtors are often eager to reestablish credit, the credit available to them is usually only in small amounts and frequently on a prepaid or secured basis.

Whatever paternalistic concerns may exist as to whether debtors who have filed bankruptcy should be offered a credit card or other credit, or even redemption or take-out financing, they do not justify restricting the availability of information about debtors who file for bankruptcy simply to make it harder to offer credit to them. This is particularly so when many bankruptcy professionals recognize that the debtor's ability to reestablish credit is an important part of his or her "fresh start."

Some have also suggested that the availability of bankruptcy information should be restricted because it might be used to discriminate in the granting of new credit on the basis of whether debtors have filed for bankruptcy.[29] However, if a debtor's prior bankruptcy is an accurate predictor of future repayment likelihood, it is beneficial to the efficiency of the credit granting system if such information is freely available.

In any event, excluding certain parties from access to information is not the appropriate way to further policy objectives, whether those policies seek to limit credit availability to bankrupt debtors or, conversely, to make credit more available by preventing creditors from considering prior bankruptcy filings. Such indirect regulation has unintended consequences that are undesirable. In this case, it would result either in interfering with the debtor's "fresh start" or in the inefficient allocation of credit.

B. Restrictions on the development of more efficient means of obtaining bankruptcy information are not desirable.

Increased availability of bankruptcy court records and trustee records by telephone, online and through retrieval intermediaries has significantly improved bankruptcy administration and increased the efficient workings of the bankruptcy system. Restrictions which curtailed availability of this information would hurt the American consumer by increasing creditor costs of administering bankruptcies, increases which are passed on in higher credit costs. As

[29] Although governmental units are precluded from discriminating on this basis for the purpose of licenses or employment, and private employers arc precluded from discriminating on this basis for some employment related purposes, private parties in general have not been limited in this way. *See* 11 U.S.C. § 525.

bankruptcy filing volume has increased dramatically, the availability of bankruptcy information has offered a means to manage what would otherwise be an overwhelming caseload. The availability of this information to the public has made possible better oversight of the bankruptcy system, and, thus, furthered the ability of the bankruptcy system to identify fraudulent and abusive use of bankruptcy, and to evaluate proposed reforms.

Much of the discussion of debtor privacy appears to be alarm at these developments. However, they should be seen as the improvements they really are and further encouraged. The more a creditor can, through a low-cost and efficient system identify a customer as one who has filed for bankruptcy, the more rapidly controls can be implemented to assure compliance with the automatic stay and post-discharge injunction. Likewise, the more rapidly and cheaply a creditor can obtain the needed information to evaluate its position, the more effectively it can participate in the bankruptcy proceeding without filing needless discovery demands, or opposing, unnecessarily, the course of the proceeding. The whole system can, through the use of technology, operate much more efficiently. The long term beneficiaries will be debtors who will more promptly receive the relief intended, and those who pay for all this--the American consumer who pays the costs of administering bankruptcies in the price of credit.

Conclusion

In addition to the significant statutory and constitutional impediments to restricting access to bankruptcy information, as a matter of policy, such restrictions would be neither feasible, fair, nor consistent with appropriate public oversight. The present bankruptcy system assumes and, as a practical matter, requires that creditors and others affected by the bankruptcy proceeding have free and open access to court record information and trustee records if such debtor benefits as the automatic stay and post-discharge injunction are to be fully effective, if creditors and other affected parties are to effectively participate in the bankruptcy proceeding, and if the controls and limitations on bankruptcy relief are to be enforced.

Moreover, public confidence in the bankruptcy system, which polls have shown is very much in question, would be further undercut if the proceedings were conducted beyond the scrutiny of the public. The very nature of bankruptcy as an extraordinary remedy makes the public suspicious that the considerable benefits debtors can obtain from it will be misused or misapplied. Conducting the proceedings behind a screen of anonymity would only reinforce these suspicions.

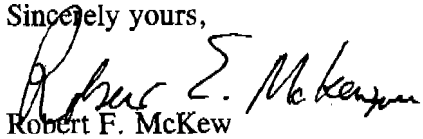
AFSA welcomes efforts to accommodate the demands of the bankruptcy system for information, the role of public oversight of the extraordinary remedies bankruptcy offers, and individual privacy concerns. There may be methods of increasing debtor privacy which will provide free and open access to the information necessary for the bankruptcy system to operate efficiently and fairly within the bounds of the Constitution, but they have not yet been suggested. The various suggestions that those advocating debtor privacy have made to reduce and restrict the long-standing open access to bankruptcy information simply will not withstand scrutiny as a matter of policy or pass constitutional muster.

It appears that no constitutional and practical means exists which will both satisfy the need for information of those affected by bankruptcy and the public, and at the same time assure a debtor seeking bankruptcy relief as much privacy as he or she would otherwise enjoy.[30] In light of the significant benefits bankruptcy offers debtors, it is not unfair that they sacrifice some privacy when they seek bankruptcy's extraordinary remedies.

* * *

AFSA appreciates the opportunity to comment on the issues raised by the Study. If you have any questions about our response, please contact either me or George J. Wallace at Eckert Seamans Cherin & Mellott LLC, 202-659-6632, our counsel in this matter.

Sincerely yours,



Robert F. McKew
Vice President and General Counsel

cc: George J. Wallace

[30] In *Cox Broadcasting Corp.* v. Cohn, *supra* at 495, the Supreme Court concluded that a state statute restricting publication of public record information to further privacy goals was unconstitutional when weighed against the First Amendment concerns discussed *infra* Pt. I.

IOWA CREDIT UNION LEAGUE

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September 22, 2000

To: Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees

From: Aimee Campin
Director of Regulatory Affairs
(aimeec@ia-icul.org)

Re: Comments on Study of Privacy Issues in Bankruptcy Data

The Iowa **Credit** Union League is a state trade association representing the interest of all 200 state and federal credit unions in Iowa. This study on privacy sparked the interest of several of our members after we sent them your request for comment. This letter is being sent in response to your request, taking into consideration the comments we received from our member credit unions. To give you au idea of who commented: the largest credit union has over $500 m&ion in assets and the smallest has just over $4 million in assets.

Types of Bankruptcy Information Used

The types and amounts of information credit unions collect from individual debtors is minimal. Most rely on the information reported in the individual debtor's credit report. Most do not seek bankruptcy information from the debtor unless there is a question regarding the bankruptcy. When a member/debtor has indicated they have filed for bankruptcy, credit unions will ask the debtor's attorney for a copy of the bankruptcy notice, since they have not yet received their copy as a creditor.

Credit unions, again, rely on credit reports to a great extent for their bankruptcy information. This practice likely will not change in the future. Credit unions, in seeking information on a bankruptcy filing, correspond with the debtor's attorney, and generally have little contact with the debtor. When there is contact it is because the member/debtor has come in to the credit union and mentioned they have filed for bankruptcy protection.

Access to Information

Credit unions are very satisfied with their access to financial information in personal bankruptcy cases. One credit union specifically indicated the fact that they have been able to challenge information in a bankruptcy filing because the member has omitted certain information that had been provided to the credit union. Without access to this information, creditors will have a difficult time determining whether their interests have been represented in the listing of debts.

Credit unions differed on whether personal financial information needed to be made available to the general public. Most, however, supported restrictions on access to personal financial information. Restrictions could be in place under the Code, so that financial information was made available to lenders/creditors but not to the general public. The credit unions responding did agree that the general public, however, should have access to the fact that individuals have filed for bankruptcy. Congress likely established this public availability as a means to deter a large number of individuals filing for protection. Some consideration should be given to protect the privacy of those individuals who have to file for bankruptcy protection for medical or other catastrophic reasons.

It is important for credit unions to be able to match a name against a social security number. Account numbers could be encrypted if the information is available electronically.

Commercial Firms Collecting and Redistributing

The Iowa Credit Union League received mixed support on commercial firms collecting, compiling and redistributing bankruptcy information electronically. Some credit unions responding do not want to see a commercial firm being able to profit from making bankruptcy information available electronically, while others felt bankruptcy trustees would be relieved from this time-consuming task.

Trustees and Non-public Information

All credit unions felt that because some information collected by the trustee is not publicly available, that certain safeguards need to be in place to ensure social security numbers and account numbers are encrypted and accessible by only a limited number of parties. Without some safeguards in place, credit unions feel putting this non-public bankruptcy information in an electronic format will open the possibilities for fraud with the system.

Credit unions supported only the bankruptcy trustee having access to non-public bankruptcy information. With this is mind, the trustee should not have any limitations or restrictions on how they use that information.

Privacy Interest of Debtor

The general consensus with credit unions responding is that upon filing for bankruptcy protection, debtors relinquish their privacy rights to a certain extent. However, to what extent debtors realize their personal financial information is going to be made public is not clear. Iowa credit unions feel that debtors, overall, would benefit from some additional disclosures by their attorney on what is and is not going to be released to the general public when filing for bankruptcy protection. Perhaps, if the bankruptcy is not absolutely necessary, the disclosures up front may deter some from filing.

Credit unions have some concern for the potential for bankruptcy debtors to become victims of identity theft or fraudulent account transactions if certain safeguards are not in place before this personal financial information (i.e., account numbers, social security numbers, etc.) is made available electronically.

Under the Fair Credit Reporting Act, permissible uses of an individual's credit report data are detailed. Similar restrictions could be detailed under the Bankruptcy Code, providing examples of authorized users and the permissible uses of such information.

Concluding Remarks

Bankruptcy records should be made available to those with a business interest in the information. The general public could simply know that an individual has filed for bankruptcy protection, in an effort to keep the deterrence factor in place, rather than have information on their personal finances.

It appears that Congress' intent in lcaving the bankruptcy records open to the public was to discourage abuse of the system. Since creditors have seen record bankruptcy filings over the last several years, this is not a time to bury pertinent bankruptcy information from those with a business need to know. While restrictions could be established for the general public, lenders/creditors must continue to have access to this information in order to make solid business decisions.

On behalf of the 200 Iowa credit unions represented by the League: we thank you for this opportunity to comment of the Department of Justice's study.

Barnhill, Leander

From: Deirdre Mulligan [deirdre@cdt.org]
Sent: Friday, September 22, 2000 8:04 PM
To: USTPrivacyStudy
Subject: Comments on Study of Privacy Issues in Bankruptcy Data

Center for Democracy and Technology
1634 I Street NW, 11th floor
Washington, DC 20006

September 22, 2000

Leander Barnhill
Office of General counsel
Executive Office for the United States Trustees
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Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Introduction and Background

These comments respond to a joint request for comments from the Department of Justice, the Department of Treasury, the Office of Management and Budget, and the Administrative Office of the U.S. Courts on the privacy issues in bankruptcy data, 65 Fed. Reg. 147 (July 31, 2000). The Center for Democracy and Technology appreciates this opportunity to comment on the important privacy issues arising in this interaction between citizens, the government, and businesses.

The Center for Democracy and Technology (CDT) is dedicated to preserving and enhancing democratic values and civil liberties on the Internet and in other interactive communications media. CDT pursues its mission through public education, grass roots organizing, litigation, and coalition building. CDT is a non-profit, public interest organization (501 (c)(3)). Along with other privacy and consumer organizations CDT has urged policy makers to ensure that the privacy of individuals' personal information is respected during interactions with the government and the private sector.

This study of privacy issues in bankruptcy proceedings is timely. Across the country government agencies at all levels are exchanging their arcane paper files and legacy computer systems for sophisticated data networks. The move to distributed, relational databases and systems promises greater efficiency. The government and citizens can benefit from new technologies that provide faster, cheaper access to government records. The Internet is erasing barriers to access such as distance, hours of operation, and lines, providing citizens and businesses with real-time access to information from their homes, offices, or community centers.

At the same time, the move to advanced information systems and the use of the Internet to promote access to government records highlights the weaknesses - or oversights-in our information policies. The private information - including in the instance of bankruptcy filings social

security and bank account numbers and other highly sensitive data-contained in so-called public records were historically protected from widespread distribution by barriers of time and location, and the inefficiencies of paper systems. The dusty papers in courthouse basements and town hall files were difficult to cull through, and expensive to transcribe and distribute. These barriers and inefficiencies resulted in what the Supreme Court in another context referred to as "practical obscurity." While private information was frequently legally accessible to the public at large, in practice it was rarely sought and rarely disclosed. The adoption of advanced information systems by all levels of government has removed these barriers to access. As a result information that was once legally available but practically private has become the backbone of a growing trade in personal information about individual citizens. In response, several states have begun to look at whether their information policy adequately addresses the privacy concerns of citizens.

The examination of bankruptcy proceedings places the privacy issues in strong relief. Individuals declaring bankruptcy must participate in this system. To gain the protection afforded by the bankruptcy system individuals must reveal the intimate details of their household finances - debts, spending habits, and assets. Such information is necessary for the bankruptcy system to fairly structure relief for debtors and secure payments for creditors. However, under the existing system much of this information is available to any other entity that seeks it. Thus, in using the bankruptcy system - clearly an avenue of last resort - citizens expose the details of their financial lives to the public at large. It is hard to imagine how such unmediated access serves the interest of society, the debtor, the creditor, or the bankruptcy system itself.

The U.S. has a long history of ensuring public access to the proceedings and records of government activities. The federal Freedom of Information and Sunshine Acts and their state counterparts ensure that governments are open and accountable to citizens. When examining the information policies appropriate for information held by the government or quasi-governmental entities the interests of individual privacy, government accountability, and the public's interest in government actions must be considered in concert. Sound information policy should structure the collection, use, and access to information to meet these important goals.

Finally, information from bankruptcy records along with other data culled from public agencies and private sources is compiled by information brokers into detailed profiles on individual citizens. These profiles are in turn sold for a variety of purposes - many of which have absolutely nothing to do with the bankruptcy system. Thus, establishing an appropriate public policy framework to address the privacy issues surrounding access to personal information about individual citizens contained in government files is directly related to the growing concern with the private sector use and disclosure of personal information. While this study is narrowly focused on bankruptcy records the reason for this inquiry and the responses it elicits should be considered more broadly as various levels of governments review and update their public record laws and policies, and adopt new information systems.

Comments and response to specific questions

CDT's expertise is in the protection of individual privacy and First Amendment freedoms. We are not experts on the bankruptcy system or process generally and therefore will look to those with more knowledge of the system to provide responses to questions that require such expertise (such

as questions regarding what data the system collects and who currently uses it). Our comments seek to provide guidance on how to structure the examination of the bankruptcy systems use of personal information to best ensure that privacy protections are built in to future information policy and information systems while at the same time ensuring for public oversight and government accountability.

Q 6.0 What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?
Q 7.0 What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy regulatory or statutory change?

This study largely seeks to address the privacy implications of two major changes in information technology since the 1970s - the emergence of large, privately held databases, and the development of interactive technologies. In large part these changes magnify existing weaknesses in the bankruptcy system's information policy rather than present distinct new issues.

While over twenty-five years old, the 1973 Code of Fair Information Practices developed by the Department of Health, Education and Welfare (HEW) is a useful starting point for reconsidering the information policy of the bankruptcy system. In 1972, then-Secretary of HEW Elliot L. Richardson appointed an Advisory Committee on Automated Personal Data Systems to explore the impact of computerized record keeping on individuals. In a report published in 1973, the Advisory Committee proposed a Code of Fair Information Practices. In general, the Code requires that: data be collected for a legitimate and articulated purpose; only data necessary to support the purpose be collected; data only be used and disclosed to advance the purpose; the individual be able to access and correct personal information; and, the collecting entity secure the information it maintains. The Code supplied the intellectual and statutory framework for the Privacy Act of 1974 and subsequent privacy legislation in this country and worldwide. These principles should govern the handling of personal information contained in bankruptcy data.

Approaching the process of establishing an information policy framework to govern the bankruptcy system from the Code of Fair Information Practices initially requires answers to the following questions:
? What is the purpose of the system?
? What data is necessary to support the functioning of the system?
? Who needs access to the various data collected to meet the system's goals?

While the Federal Register Notice touches upon each of these questions in varied ways, we believe their importance must be emphasized. Questions found in the notice such as (1.6) How valuable is the information in the marketplace? and (1.2) Which of these data elements are public record data?, while useful should not be the focal point of the inquiry. Some of the questions set out in the Federal Register Notice could be taken to suggest that, unless there is a compelling privacy interest, personal information collected through the bankruptcy process should be publicly accessible. Under the Code of Fair Information Practices, which we believe should provide the framework for this study, the presumption rests the in the other direction. The resulting information policy should be in favor of protecting the privacy of individual citizens who interact with the bankruptcy system by limiting the use and disclosure of personal information to those necessary to support the bankruptcy process. Additional considerations of government accountability and public oversight should be considered as the policy is formed, but the Code should serve as

the starting point.

Q 1.5 Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

The sensitivity of the data should not be the determining factor in whether personal information provided during the bankruptcy process is available for other purposes. The principles found in the Code of Fair Information Practices should be the starting point for all policies concerning personal information. However, there is wide spread recognition that certain types of information can place individuals at risk for other harm. For example, address information allows for the individual to be located. In some instances individuals go to great lengths to ensure that information about their residence is not available to others. Individuals fleeing domestic abuse, law enforcement and other public officials, doctors and other providers of controversial medical services frequently shield information about their address from the public to avoid harm. In other cases, the availability of certain kinds of personal information can subject individuals to financial loss. In many instances the credit bureaus truncate consumers' account numbers on credit reports to limit the possibility that a report in the wrong hands will compromise individuals financial well being as well as their privacy. Similarly, the FTC, the White House, Congress , as well as the Individual Reference Services Group (representing the major information brokers) have all singled out the Social Security Number for special protection. These special protections, to a greater or lesser extent, recognize in the words of one court that, "Thanks to the abundance of data bases in the private sector that include the ssn's of persons listed in their files, an intruder using an ssn can quietly discover the intimate details of a victim's personal life without the victim ever knowing of the intrusion." Clearly certain types of personal information have garnered special consideration due to the additional harm that can result from their disclosure.

Q 2.1 What methods of data collection and aggregation are now used by the courts, creditors, trustees, and other private actors to collect, analyze, and disseminate public record data and non-public data?
Q 2.2 What methods are being contemplated for the future?
The government and private sector alike are undergoing major changes in how they collect, analyze and distribute information. Increasingly all facets of information collection and processing are automated. For reasons of efficiency and fraud reduction various government entities are integrating, or at least linking, their information systems. Public access is increasingly provided electronically, in some instances real-time access is provided over the World Wide Web or other Internet communication protocols. The bankruptcy system itself and those who gather information from the system for other unrelated purposes are experiencing some or all of these changes.

Q 3.0 What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances?
Q 4.0 What are the privacy issues raised by the collection and use of personal financial and other information in bankruptcy proceedings?

The public has an interest in knowing how the government conducts its business. At times such accountability requires the disclosure of personal information. For example, arrest records containing the names of

individual citizens are available to the public. They serve as an important check on the government's ability to limit the freedom of individual citizens. Removing the names of arrestees would hamper public oversight of government's law enforcement activities.

In other instances personal information is made available to ensure that all parties who will be effected by a given action of the courts or other governmental entity can represent their interests. Notices of bankruptcy filings and access to information about who is seeking to use the bankruptcy system provide notice to parties who may have an interest in the disposition of the assets at issue.

However, in the case of arrest records we find that only limited information is provided about the interaction between the citizen and the government. The law enforcement system contains far more information about the situation leading up to the arrest than is found in the public record. While the detailed information is necessary for the functioning of the law enforcement system, public accountability requires disclosure of a small subset of that information. Similarly, in the bankruptcy context general information about the individual filing for bankruptcy may need to be available to the public to ensure that all those with a stake in the outcome can participate . But, detailed information, currently considered public records under 11 U.S.C. §107(a) such as bank accounts and identifying numbers, credit card account numbers, social security numbers, bank balances, etc. are not necessary to ensure that parties with an interest are notified. As discussed above the public disclosure of such information breaches personal privacy and places individuals at risk of additional financial harm.

As the Notice states the trustee often collects additional information about the debtor, including tax returns and detailed accounts of living expenses, to assist them in structuring and overseeing the bankruptcy process. While this information may be vital to the proper administration of the bankruptcy process its disclosure should be strictly limited. Individuals and entities that are not a party to the proceeding should not have access to such information. Even parties to the proceeding may not need access to all the data collected by the trustee to ensure their interests are protected. For example, access to records such as tax returns should be quite limited.

Individual citizens seeking the protections afforded by the bankruptcy should expect to suffer some loss of privacy vis a vis those who administer the system and those to whom they owe funds. To gain the assistance of the courts they must provide the information necessary for the bankruptcy process to fairly structure a relationship between the debtor and his or her creditors. But, the exposure of the individual's personal information should be no greater than necessary to fairly serve the purpose of the bankruptcy process. Debtors in bankruptcy proceedings should not have the details of their financial lives open to the public at large.

There may be legitimate public interest considerations for providing aggregate reports, stripped of information that may identify specific individuals, on debtors' interactions with the bankruptcy system and creditors. The public, advocacy organizations, the government, and the private sector have an interest in information about the financial health of the public. Thus, while details about specific individuals should be protected from inappropriate disclosure the bankruptcy system should provide information that allows for public review and oversight of its operations.

Q 5.0 What is the effect of technology on access to and privacy of personal information?

Whether technology advances or undermines privacy depends upon the policies that guide its development and use. While in some instances the technology itself raises new challenges to privacy protection, to a large extent advances in technology are emphasizing weaknesses in our existing information policy. The privacy of debtors is not protected under existing bankruptcy rules - with or without the automation of information. Whether new technologies adopted by the bankruptcy system will undermine privacy largely depends on what policies the bankruptcy system puts in place at the front end. Information systems can alleviate many of the monitoring and oversight problems inherent in paper based record systems. For example, it is more difficult to monitor access to file cabinets and storage rooms then it is to track access to electronically stored information through the use of audit trails. However, if computerized systems are designed without an eye toward protecting privacy they can exacerbate existing privacy loopholes and present unique challenges to protecting privacy. For example, computer systems designed without adequate audit trails can potentially increase information misuse by allowing individuals to access information without creating a detailed record of their actions and identity.

Policies that protect individual privacy in the bankruptcy system should be adopted before the adoption of new information technologies.

Conclusion

This study largely seeks to address the privacy challenges posed by two major changes in information technology since the 1970s - the emergence of large, privately-held databases, and the development of interactive technologies. In large part these changes magnify existing weaknesses in the bankruptcy system's information policy rather than present distinct new issues. While this study is narrowly focused on bankruptcy records the reason for this inquiry and the responses it elicits should be considered more broadly as various branches of government review and update their public record laws and policies, and adopt new information systems. The U.S. has a long history of ensuring public access to the proceedings and records of government activities and protecting individual privacy: doing so requires thoughtful policy making. When examining the information policies appropriate for information held by the government or quasi-governmental entities the interests of individual privacy, government accountability, and the public's interest in government actions must be considered in concert. Sound information policy should structure the collection, use, and access to information to meet these important goals.

We thank you for the opportunity to comment upon this study.

Sincerely,

/dkm/

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OHIO CREDIT
UNION LEAGUE

OHIO CREDIT UNION LEAGUE

Comments On The Department of Justice, Department Of The Treasury And Office of Management And Budget Study Of Financial Privacy And Bankruptcy

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The Ohio Credit Union League, (OCUL) the trade association for credit unions in the State of Ohio representing over 540 credit unions, both federal and state chartered, appreciates the opportunity to comment on the Department of Justice, Department of the Treasury and the Office of Management and Budget's (the Agencies) study of how the filing of a bankruptcy affects the privacy of consumer information that becomes part of a bankruptcy proceeding.

Credit unions are non-profit financial cooperatives governed by unpaid volunteers that predominately engage in various financial services to their members, who are also owners, particularly in making available loans and credit. As members and owners, credit union members can participate in the credit union as both users and customers as well as in the governance through the election of the directors of the credit union under the democratic process of one member one vote.

This study by the Agencies will consider how the privacy interest of consumer information that becomes part of a bankruptcy proceeding is affected by the public availability of such information, while considering the need for access to this information and the accountability in the bankruptcy system.

In general, a person who files for bankruptcy must provide detailed financial information as part of the schedules that are filed with the bankruptcy court. This detailed financial information may include lists of the accounts with financial institutions and creditors that comprise of account numbers and the balances; credit card account numbers; social security numbers; balances owed to creditors; income sources; list of assets; and a budget showing the debtor's expenses. By statute, this and all other information filed with the court is publicly available. However, in other non-bankruptcy contexts, such as banking and credit reporting, there are regulations and other safeguards designed to ensure the confidentiality of this information.

In the past, such access by the public has, as a practical matter, been quite limited. Obtaining this information required considerable time, effort, and sometimes money. However, the development

of technology and Internet access raises the possibility that this sensitive information may be obtained easily by others who may use the information for fraudulent purposes.

Bankruptcy trustees have access to this public information and often receive other sensitive information from debtors, such as tax returns, additional information about assets and liabilities, an accounting of living expenses, payment schedules to creditors, and information about alleged wrongdoing. This information is not generally available to the public, but is needed to administer the bankruptcy case, and the bankruptcy trustee is allowed to provide this information to creditors, attorneys, and others with a legitimate interest in the case. However, there are no well-defined limits on the bankruptcy trustee's authority to disclose this information to others or limits on the authority of these other parties to use, sell, or transfer this information.

Furthermore, the Agencies' have stated in their request for comments that this study will examine the following issues:

- The types and amounts of information that are collected from and about individual debtors, as well as analyzed and disseminated, in personal bankruptcy cases.
- Current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings.
- The needs of various parties for access to financial information in personal bankruptcy cases, including specifically which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances.
- The privacy issues raised by the collection and use of financial and other information in personal bankruptcy cases.
- The effect of technology on access to, and the privacy of, a debtor's personal information.
- Business or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records.
- Principles for the responsible handling of information in bankruptcy records, and recommendations for any policy, regulatory, or statutory changes.

In reviewing the study and the specific issues raised, OCUL, as the trade association for credit unions in the State of Ohio, will generally address the issues as they pertain to credit unions.

- **What types and amounts of information are collected from individual debtors in personal bankruptcy cases? How are these various types of information used?**

  It is OCUL's understanding that a case number, filing date, and attorney information is requested. In addition, the reason for the bankruptcy filing and the individual's intention regarding their accounts are ascertained. Once this information is collected or determined, a decision is made as to how to handle each account.

- **What are the current practices for collecting information from debtors? How do you think these practices will change in the future?**

  Account holders at credit unions are both members and owners and as such their relationship with the credit union will usually differ from the relationship of a depositor at other financial institutions. As a result, it is not unusual that the practice

of collecting information from debtors will involve some manner of contact with the member, most likely by telephone, but occasionally in person. Moreover, it is anticipated that this practice will continue.

- **Is the access you have to financial information in personal bankruptcy cases sufficient? Should certain information that is currently publicly available be made available only to a limited class of persons, such as creditors? Should social security numbers, bank account numbers, and other account numbers should be included in this category? Should restrictions on this information vary based on whether the information is available electronically?**

  At the present time access to the financial information is obtained from the court by requesting a copy of the schedules. It is also available by reviewing the file itself. In addition, this information is also publicly available, which includes the individual's personal financial information. OCUL is concerned that limiting this information to only a limited class, such as creditors, may be difficult to accomplish. Moreover, limiting who is a "creditor" by definition may very well preclude other parties such as potential lenders from acquiring information necessary to determine credit availability. However, OCUL does suggest that restrictions as to the use of this information be adopted. This would not only limit those that can access this information, but also how and for what that information can be used. Moreover, these restrictions should also include accessibility of account numbers or social security numbers and their use as well. Furthermore, these restrictions should also apply to the access of this information electronically.

- **As mentioned in the above summary, certain information is not public but is collected and disseminated by bankruptcy trustees. Is all of the information collected by the trustees necessary for the administration of the bankruptcy case? Do the existing limitations on the trustee's handling of the information raise any problems? Would you support the idea of commercial firms collecting, compiling electronically, and redistributing this information? Do debtors have a privacy interest in this non-public information?**

  OCUL believes that it is necessary for the bankruptcy trustee to have access to all the financial information necessary to make a determination as to whether the debtor qualifies for bankruptcy relief or not. Moreover, the bankruptcy trustee needs to determine what information is necessary for them to make a decision on the debtor's status. More importantly, by virtue of his or her position as a bankruptcy trustee, he or she is restricted as to what can and cannot be made public. Furthermore, OCUL is not aware of any problems that bankruptcy trustees have regarding the handling of this information under the existing limitations.

  In addition, the idea of commercial firms collecting, compiling electronically, and redistributing this information is a concern to OCUL. OCUL believes that before this process is permitted, if at all, certain safeguards, restrictions and adequate protections should be in place in order to safeguard the non-public information.

OCUL also believes that the debtor has a primary interest in any information that is not public.

- **Should there be restrictions on the use and disclosure of information that is not public but is collected by the bankruptcy trustee? If so, what types of restrictions should apply?**

  It is OCUL's position that there should be restrictions and penalties on the use and disclosure of non-public information that is collected by the bankruptcy trustee. Moreover, this information should only be made available to creditors, or others that would qualify as "affected or interested parties" that are involved in the case and these creditors and others should be required to request that information in writing from the bankruptcy trustee. These creditors should be permitted to have full disclosure of the financial information. However, this information and its use should be restricted and therefore, not disseminated to the general public by anyone who has access to this information including the creditors.

- **As mentioned in the above summary, certain information collected during a bankruptcy proceeding is publicly available. Do debtors have a privacy interest in this information? Do these interests vary based on the type of information? Do debtors understand the loss of privacy of this information? Should they be expected to forego any privacy expectation? What are the benefits of having this information publicly available?**

  OCUL believes that debtors should have some privacy interest in information gathered for bankruptcy proceedings. For example, income and household budget information should not be publicly available. Furthermore, it is OCUL's belief that debtors in general do not understand that their financial background and information may be public information. Moreover, the debtor should have some expectation of privacy in that there is no benefit in making all the information public. More importantly, the use of this information could affect the individual long after the bankruptcy is discharged.

- **Do the privacy interests of bankruptcy information change when such information is available electronically?**

  OCUL believes that the privacy interests of bankruptcy information changes when such information is made available electronically in that anyone would be able to access that information and use that information for numerous reasons which, very well could be detrimental to the debtor. This especially applies to the debtor's account numbers and other identifiable numbers and codes.

- **Should there be privacy safeguards for bankruptcy information? If so, how can they be structured so as not to interfere with your need for the information? Should notice about the public nature of the information be given to debtors?**

  It is OCUL's opinion that there should be some safeguards for bankruptcy information. The information could be categorized as to public and non-public information, and who may have access, such as creditors, and what factors are used

to determine accountability. In addition, general information concerning the bankruptcy could be accessed by the general public.

10. Other comments?

It is OCUL's position that all the information collected in a bankruptcy proceeding should not be publicly accessible nor should everyone have access to this information. OCUL believes that consideration should be given to what information is public and non-public, what information is limited to only "interested parties", and what restrictions are attached to other available information, e.g. use of bankruptcy lists for marketing purposes.

The above represents the opinion of the Ohio Credit Union League and OCUL appreciates the opportunity to comment on the above-proposed study. OCUL is also willing to provide additional comments or suggestions if requested. If you have any questions, comments or if OCUL can be of further assistance please do not hesitate to contact us.

Respectfully submitted,

John F. Kozlowski, General Counsel
Ohio Credit Union System

Paul L. Mercer, President Ohio Credit Union System	Gerald D. Guy, Chair Ohio Credit Union League Board of Directors	Sharon Custer, Chair Ohio Credit Union League Regulatory Response Subcommittee

JFK / plb

VIA E-MAIL: USTPrivacyStudy@usdoj.gov

September 22, 2000

Mr. Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
Suite 780
Washington, DC 20530

RE: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the study by the Department of Justice, Department of Treasury, and the Office of Management and Budget of how the filing of a bankruptcy affects the privacy of consumer information. The study will consider how these privacy interests are affected by the public availability of such information, while considering the need for access to this information and the accountability in the bankruptcy system. We recognize that the interrelationship between privacy and bankruptcy is an important issue and we commend the agencies for undertaking such a study and for inviting public comment from all interested parties.

CUNA is the country's largest credit union advocacy organization, representing approximately 90% of the nation's 10,500 state and federal credit unions. This letter reflects the opinions of those credit unions and the opinions of CUNA's Consumer Protection Subcommittee, chaired by Kris Mecham, CEO of Deseret First Credit Union, Salt Lake City, Utah.

With regard to disclosing bankruptcy information, credit unions recognize that there is a general heightened concern about the privacy of consumer information. CUNA was actively involved during the Congressional debate last year regarding the privacy provisions of the Gramm-Leach-Bliley (Act) and has worked with several federal agencies that were charged with drafting the regulations required under the Act. CUNA has also been actively involved at the state level and, with our affiliated state credit union leagues, has worked with the various legislatures, which have also considered this issue. We have worked hard to ensure that the

new privacy laws and regulations adequately balance the privacy needs of consumers while allowing credit unions to continue to provide their members with high quality service and products in an efficient manner.

We realize that most people are devastated when they realize that they have to declare bankruptcy. For them, bankruptcy is a defeat and a declaration that they can no longer survive financially unless they pursue this course of action. They often realize that bankruptcy will cause financial losses for others and a general loss of trust. This realization adds an emotional element to the bankruptcy process.

However, people under such circumstances are fortunate in one sense because the current bankruptcy laws, while not perfect, provide them with protections and an ability to reshape their financial lives in an effort to secure a more prosperous future. Credit unions are willing to work with their members who face such circumstances in order to help them through this difficult process and to help them secure a more promising financial future.

Although credit unions are compassionate towards their members who are forced to declare bankruptcy, credit unions, as creditors, need unfettered access to all information that is submitted by the debtor during the bankruptcy process. These debtors must give full disclosure of their financial information because with this information, creditors can adequately minimize any losses they may suffer through no fault of their own. Creditors are entitled to this information in order to protect their interests, and this access to the information clearly outweighs the debtor's potential loss of privacy.

The possible loss of privacy should come as no surprise to debtors. If debtors are unable or unwilling to fulfill their financial obligations, they should expect to have their financial obligations carefully scrutinized by any creditor that may suffer a financial loss as a result of their inability to pay. The debtors' attorneys should also explain this potential loss of privacy when advising their clients as to whether bankruptcy is the appropriate course of action. Debtors, in consultation with their attorneys, may then factor this possible loss of privacy into their decision to the extent they deem appropriate.

A person who files for bankruptcy must provide detailed financial information, which is incorporated into the schedules that are filed with the bankruptcy courts. These schedules contain a listing of income and debts and credit unions rely on the information for purposes of protecting their interests. Credit unions and other creditors use this, and other information obtained from the debtor's attorney and during the meeting of creditors, to determine what type of bankruptcy was filed and which debts were discharged, reaffirmed, or paid outside of the bankruptcy plan. Creditors also use this and all other available information to ensure that the bankruptcy is properly administered.

In certain situations, these disclosures benefit debtors. Under current law in some jurisdictions, and in legislation currently before Congress, debtors may be permitted to reaffirm their debts in order to continue their creditor relationships. Courts often require significant disclosure of information as part of this reaffirmation process.

Credit unions also review the information in the bankruptcy schedules for possible indications of fraud. If such indications of fraud are present, credit unions may then proceed with adversary proceedings, which may lead to a judgment and relief from the automatic stay. These efforts to legally pursue collection would be hampered if the creditors' access to the information were restricted.

Credit unions would also not support any additional restrictions that could affect the bankruptcy trustees' ability to collect additional information. The trustees should have discretion to determine the information they need to ensure that they can adequately fulfill their duties of accounting for all the debtor's assets and to ensure that creditors receive any payments they may be entitled to. Credit unions have confidence that the trustees are currently collecting the information they need in order to administer the bankruptcy cases.

We believe the entry of commercial firms into the business of aggregation and disseminating information could reduce the cost of bankruptcy and enhance the availability of essential information. However, credit unions recognize the need for proper limitations to ensure the necessary safeguards and could support a general prohibition on the sale or other distribution of a debtor's financial information to those with no legitimate need for it.

The ability to obtain bankruptcy information electronically will be of benefit to many credit unions because it will reduce the costs associated with traveling to the courthouse and the costs of copying the necessary information. Although the evolution of technology and the Internet has greatly facilitated access and enhanced the accuracy of bankruptcy information, we recognize that this has to some extent compromised consumer privacy. For this reason, credit unions could possibly support some modest restrictions to the access of information that is submitted as part of the bankruptcy process. One example is restricting the public availability of information regarding the health of the debtor. Again, we must make it clear that such restrictions would only be acceptable as long as it does not in any way impact a credit union's ability to have unfettered access to all the information they need.

If bankruptcy information is available electronically, it may be acceptable to secure this information by requiring the use of a password. Restricting this information to only those with a legitimate interest should minimize the misuse of such information. Specifically, we recognize that social security and account numbers may be especially sensitive and could be used by others for fraudulent

purposes. However, this risk may be minimal because those interested in committing identity theft crimes are generally not interested in assuming the identity of a person in bankruptcy, and financial institutions typically close out the account or change the account numbers of bankrupt persons.

In sum, if restrictions are imposed that would prohibit such information from being publicly available, electronically or otherwise, it is imperative that creditors, including credit unions, have continued access to the information for the reasons stated above. In particular, debtors have often changed names or provided incorrect names on applications. In these situations, social security numbers are the only means to determine which accounts at a credit union are being affected by the bankruptcy.

Thank you for the opportunity to comment on the study of how the filing of a bankruptcy affects the privacy of consumer information. If you or agency staff have questions about our comments, please give me a call at (202) 218-7795. In your solicitation for comment on the study, you also requested addresses, fax numbers, and e-mail addresses. If you need to contact us, you may send information to my attention at 805 15th Street, NW, Washington, DC 20015 or e-mail it to me at jbloch@cuna.com. Our fax number is (202) 371-8240.

Sincerely,

Jeffrey Bloch
Assistant General Counsel

September 22, 2000

VIA EMAIL USTPrivacyStudy@usdoj.gov

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, N.W., Suite 780
Washington, DC 20530

RE: Comments on Study of Privacy Issues in Bankruptcy Data

ChoicePoint Inc. ("ChoicePoint") is pleased to submit these comments, regarding the joint study by the Department of Justice, Department of Treasury, and the Office of Management and Budget about the impact of a bankruptcy filing on the privacy of an individual's consumer information that is included in a bankruptcy case ("Study").

ChoicePoint is the nation's premier source of personal information to the insurance industry and a leading provider of decision-making intelligence to businesses, individuals and government. Through the identification, retrieval, storage, analysis and delivery of data, ChoicePoint serves the informational needs of the property and casualty insurance market; life and health insurance market; private businesses, including Fortune 1000 corporations, asset-based lenders and professional service providers; and, federal, state and local public sector agencies. ChoicePoint is also the largest provider of personal information products to employers for pre-employment background screening purposes.

Continued access to bankruptcy filings is important to ChoicePoint. As described below, ChoicePoint relies upon information contained in public records, including bankruptcy filings, to provide many products and services which promote the greater good of society by enhancing public safety and personal security and fostering economic activity and growth.

At ChoicePoint, protecting the privacy of all personal information, including personal information contained in bankruptcy filings, is a priority. As described below, ChoicePoint adheres to all applicable laws and industry-initiated self-regulatory principles that govern the collection, use, and disclosure of personal information. In addition, ChoicePoint has been and continues to be an industry leader in adopting strong consumer privacy protections that go beyond the legal requirements.

Continued Access to Public Records, Including Bankruptcy Filings, Is Important for the Greater Good of Society.

Under the Bankruptcy Code, papers filed in connection with a bankruptcy case as well as bankruptcy courts' dockets, are public records[1] and are available in an automated database.[2] Historically, information has been placed in public records, including bankruptcy records, because its availability served important or compelling public purposes, including public

[1] 11 U.S.C. § 107(a). ("Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.")

confidence in the judicial system. There is a well-developed tradition of commercial use of public records, including bankruptcy records. Publicly available bankruptcy files contain the following categories of personal information obtained by ChoicePoint: debtor's name, address, and Social Security Number, and information regarding the debtor's total (rather than individual) assets and liabilities.

ChoicePoint does not rely solely upon bankruptcy records as a source of name, address, and Social Security Number. Personal identifiers are used to match personal data contained in disparate sources and are critically important in ensuring that reputable, reliable, and accurate information is delivered for sensitive decisions.

The information industry, including ChoicePoint, uses personal information, including Social Security Numbers, to combat identification theft. Without certain identifying information, such as a Social Security Number, it is much more difficult to verify whether an individual is who he claims he is; to match the right person with the right data; and to identify the correct individual in response to a request for data. Efforts to minimize and guard against identification fraud would be crippled if private sector information repositories could not use personal identifiers, such as Social Security Numbers, to detect and guard against identification fraud.

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[2] Bankruptcy records are now available via the automated online PACER service (Public Access to Court Electronic Records). Administrative Office of the United States Courts, Report to Congress on the Optimal Utilization of Judicial Resources, 29 (Feb. 2000).

In addition to using personal information in an effort to prevent identification fraud, ChoicePoint uses bankruptcy records to create products and services used by legal firms, private investigators, insurance investigators, police, government agencies, and many others to make decisions that matter including the following:

- Identifying and verifying the assets of a person (or business): ChoicePoint does not obtain information from bankruptcy files describing debtors' individual account information, but, instead, obtains information regarding debtors' total assets and liabilities. This information is useful, for example, in locating assets in connection with child support cases and verifying that an individual has accurately represented his or her assets in court proceedings.

- Locating individuals and businesses: Personal information included in bankruptcy records may also be used to help locate individuals and businesses in connection with fraud cases; to track down individuals whose child support payments are in arrears ("deadbeat dads"); to locate missing persons such as kidnapped or runaway children, heirs, pension beneficiaries, witnesses, and prospective organ donors; and, for law enforcement purposes (*e.g.*, locating bail jumpers or fugitives with outstanding warrants).

- Developing background information on a person or on a business: ChoicePoint is the largest provider of pre-employment background screening services in the U.S. Public

records, including bankruptcy records, may provide critical information for employers considering an individual for certain positions. ChoicePoint is also a leading provider of online and on-demand public records, including bankruptcy records, for due diligence information services to secured lenders, legal, and professional service firms.

- Investigating insurance claims and subrogation cases: ChoicePoint may provide bankruptcy information to insurance companies in connection with fraud investigations. Reducing the instances of fraudulent insurance claims benefits all insureds by keeping premiums down.

- Conducting pre-trial preparation: Representatives of the legal community rely upon ChoicePoint products and services for trial preparation such as locating witnesses and finding assets.

ChoicePoint Protects the Privacy of Consumers' Personal Information.

All of ChoicePoint's products are subject to important privacy protections provided by federal and state laws, such as the Fair Credit Reporting Act ("FCRA")[3] and its state law counterparts and/or self-regulatory standards. A founding member of the Individual Reference Services Group ("IRSG"), ChoicePoint adheres to the IRSG Self-Regulatory Principles which have been approved by the Federal Trade Commission.

[3] 15 U.S.C. § 1681 et seq.

To underscore our fundamental commitment to privacy and our vision that good privacy is good business -- for ChoicePoint, for our customers and for consumers -- we have adopted comprehensive, state-of-the-art privacy principles which we apply in addition to the privacy protections mandated by law or self-regulatory principles. ChoicePoint supports fair information practices standards including a robust consumer notice, choice, consumer access and correction, data quality, and meaningful oversight and remedies. These fair information practices are the foundation upon which our Privacy Principles are built.

In addition, ChoicePoint is one of the few companies, if not the only major company, in the nation that has created a special committee within its Board of Directors devoted exclusively to privacy issues, and in particular, to overseeing the implementation and future development of our privacy principles.

Our commitment to privacy is also demonstrated by our extensive administrative, physical, and technological security measures. For example, ChoicePoint takes steps to protect information from unauthorized access by written security policies; employee background screening; employee confidentiality agreements; security training; secure facilities (*e.g.*, restricted access, access codes); the use of encryption and firewall technology; monitoring employee/contractor/subscriber compliance; and audits. ChoicePoint also regularly undergoes review of its security policies and procedures.

ChoicePoint also follows strict procedures to determine that subscribers are reasonably identified, meet qualifications that establish them as appropriate users, and agree to terms and conditions prior to accessing information. ChoicePoint follows a procedure to establish that the user is an established professional or commercial entity. Access requires user identification and user passwords. ChoicePoint does not provide access to members of the general public. We also require users to agree to use the information appropriately or risk termination of their access.

ChoicePoint appreciates the opportunity to submit comments on the Study. Please contact me if you have any questions regarding this submission.

Sincerely,

J. Michael de Janes
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Before the
Department of Justice
Department of the Treasury
Office of Management and Budget

In re:

Study of Privacy Issues	:	
In Bankruptcy Data	:	September 21, 2000

Comments from Richard Blumenthal,
Attorney General of the State of Connecticut

Thank you for the opportunity to respond to your solicitation of public comment in regard to your study of how the privacy of interests of debtors in personal bankruptcy cases are affected by the public availability of information about them in those cases. At the outset, I commend the separate comments filed by the National Association of Attorneys General to your consideration, because they well highlight the plethora of issues raised in any discussion of consumer privacy in the context of Internet access to consumer information contained in bankruptcy filings.

As you may know, I have gone on record time and again in varying contexts to support the need for the protection of personal privacy in today's increasingly connected world. Indeed, what distinguishes the state from other creditors who may comment here on these issues in the bankruptcy context is that the state also has a duty to protect the debtors themselves, to ensure that the loss of privacy which is necessitated from their filing for bankruptcy does not require them to surrender any privacy rights beyond that which is required to make the bankruptcy system function honestly and responsively.

Still, as a governmental unit seeking to protect the public funds, which may clearly be impacted by a bankruptcy of one of its taxpaying citizens, the state also has a strong concern that the identity of such individuals and any liability they have to the state be readily determinable. For example, I am concerned that in our role as protector of the public interest we are able to act promptly to identify filers who have trampled on consumer rights or who have violated environmental laws, but seek to use the bankruptcy process to avoid the consequences. Clearly, access to bankruptcy records on the Internet has proven to be a major benefit and time-saver to states which often have interests in bankruptcy cases around the country but lack the financial resources or staff to travel to those courts.

Given all of the issues involved, I believe that the study now being conducted by the Department of Justice is timely and important to help ensure that technology advancements in the legal field promote justice but at the same time, do not unfairly jeopardize the ability of individuals to control the uses to which the information obtained about them is put.

That is why I look forward to participating further in this process as specific proposals take shape.

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Barnhill, Leander

From: s e kurlansky [sekurl@hotmail.com]
Sent: Friday, September 22, 2000 2:28 PM
To: USTPrivacyStudy
Cc: oldsalt609@hotmail.com@inetgw

gentlemen/ladies,
I have always been sensitive to the use/abuse of personal identification information. I sincerely believe that no one should have access to the number which identifies any person's financial records and history from a single identifiable number.

While I theoretically believe that the social security number should only be used by the Soc. Sec. Admin., I am practical enough to realize that with I.R.S. tacking on to it, this is no longer a practical position. However, I feel that no other agency should have access to use it. THERE SHOULD BE A SEPARATE PERSONAL IDENTIFICATION NUMBER ALSO ASSIGNED TO AN INDIVIDUAL WHICH COULD BE MADE PUBLIC WITHOUT VIOLATING AN INDIVIDUAL'S PRIVACY.

This second number could be also a person's permanent passport number and serve a multiple of purposes whether it is could the PERSONAL IDENTIFIER or some other name.

However, the biggest concern I have is the posting this number on a public record and it becoming available to the world via the Internet. I sincerely hope you might agree.

Please give this some consideration in your study.

Thank you,
steve kurlansky
sekurl@hotmail.com

Barnhill, Leander

From: mary jeffery [mejeffery.esq@juno.com]
Sent: Friday, September 22, 2000 10:38 AM
To: USTPrivacyStudy
Subject: Comments of the Study of Provacy Issues in Bankruptcy Data

In response to the UST's request for comments concerning privacy in bankruptcy, there is a particular and pressing need for protecting the privacy of victims of domestic abuse.

Abusers often will attempt to use whatever means they can to control their victim, which creates specific needs for privacy. In fact, the fear of information being obtained by an abuser might lead an abused person to forego much needed relief in bankruptcy.

Even under the current system, all debtors must provide their names, addresses and social security numbers on a petition, which is then made available to the public, including anyone who might use the information to further terrorize a victim.

For the victim of domestic abuse, the bankruptcy system should provide protection and confidentiality, particularly of the whereabouts of the victim. This could be accomplished by creating a lock box system for receivng mail using the US Trustee's (or some other neutral party) address for the victim on the petition.

Protecting the confidentiality of the victims of domestic violence will allow them to use the bankruptcy process without fear of further exposure to violence, and will allow them access to the fresh start they often need following the bad experiences they endured.

Further, any distribution by anyone of information related to the bankruptcy of a victim of violence is obviously more troubling than in other contexts. It is just such potential problems that dictate the these practices be stopped.

Thank you for this opportunity to address these issues.

Mary Jeffery, Esquire
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MEJeffery_esq@yahoo.com

CBA | CONSUMER BANKERS ASSOCIATION

September 22, 2000

Mr. Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
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Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

This comment letter is filed on behalf of the Consumer Bankers Association ("CBA")[1] in response to the request by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the "Agencies") for public comment in connection with their study of financial privacy and bankruptcy (the "Study").

The Agencies are responding to a component of the "Clinton-Gore Plan to Enhance Consumers' Financial Privacy" by studying "how best to handle privacy issues for sensitive financial information in bankruptcy records" including "the privacy impact of electronic availability of detailed bankruptcy records, containing financial information of vulnerable debtors." We note that the Agencies have proposed a broad study. We are particularly pleased that, at the outset, the Agencies recognize the needs of many parties for continued access to financial information in personal bankruptcy cases. CBA appreciates the opportunity to contribute comments for consideration in the Study.

In General

Section 107 of the Bankruptcy Code (the "Code") requires that "a paper filed in a case under [the Code] and the dockets of the bankruptcy court are public records and open to examination by an entity at reasonable times without charge."[2] There are only two instances in the Code when the bankruptcy court may decline to make information publicly available: (1) if the information is "a trade secret or confidential research, development, or commercial information;" or (2) to "protect a person with respect to scandalous or defamatory matter."[3] Therefore, the law requires all information filed in connection with a bankruptcy proceeding, such as a debtor's name, address, and account numbers, be made publicly available.

Jnformation filed in connection with a bankruptcy proceeding is made publicly available for several important reasons. Most fundamentally, public availability of judicial records and information is a cornerstone of our judicial system dating back to common law and embodied in our Constitution.

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[1] The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer finance (auto, home equity and education), electronic retail delivery systems, bank sales of investment products, small business services, and community development. CBA members include most of the nation's largest bank holding companies as well as regionals and hold two-thirds of the industry's total assets.

[2] 11 U.S.C. 107(a).

[3] *Id.* at 107(b).

As a practical matter, Congress and the courts have also recognized that creditors and other parties must have access to bankruptcy information in order to participate effectively in a bankruptcy case, In fact, Congress and the courts have specifically noted that information filed with the bankruptcy court must be made available to all entities and individuals so that they may more effectively manage credit risk and conduct business transactions.

Common Law and the Constitution

The Agencies are studying an aspect of our judicial system which is grounded in the common law and the United States Constitution. The judicial system in the United States has maintained a tradition of public access to judicial proceedings and documents. This tradition instills a public trust in our judiciary. It also allows the public to monitor and check a system with no direct accountability to the people. In fact, relying on both common law tradition and the Constitution, the Supreme Court has repeatedly upheld the public's general right to "inspect and copy public records and documents, *including judicial records and documents"* (emphasis added).[4] In support of its conclusion, the Court emphasized that a "citizen's desire to keep a watchful eye on the workings of public agencies" has been recognized as a traditional justification under common law to allow access to public records.[5] The Court has also stated that the First Amendment's "guarantees of speech and press.. . prohibit government from summarily closing courtroom doors which ha[ve] long been open to the public," fostering public trust in the judicial system and public affairs.[6]

By enacting section 107 of the Code, Congress "codif[ied] the public's general right under common law to inspect and copy public documents."[7] This general right to access is not absolute' and Congress specified only two circumstances when the right of public access to bankruptcy information must yield to the need to protect sensitive information.[9] In drafting section 107(b) of the Code, Congress granted bankruptcy courts the ability to protect information "with respect to a trade secret or confidential research, development, or commercial information" as well as "scandalous or defamatory matter" which may be filed as part of a bankruptcy case.[10] As a result, unless a party in interest or the bankruptcy court can demonstrate that information filed in a bankruptcy case falls within one of these narrow exceptions, information must be made available to the public pursuant to section 107(a) of the Code.

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[4] Nixon v. Warner Communications, 435 U.S. 589, 597 (1978).

[5] *Id.* at 597-98

[6] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

[7] 2 Collier on Bankruptcy ¶ 107.02. (Lawrence P. King ed., 15th ed. 2000).

[8] See, *e g* Globe Newspaper Co v. Superior Court, 457 U S. 596 (1982).

[9] For a discussion of the constitutionality of the exceptions in 11 U.S.C. 107(b). and the judicial traditions supporting such exceptions, see William T Bodoh & Michelle M Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code 107 and Its Constitutional Implications*, 24 Hastings Const. L.Q. 67, 90-94 (I 996)

[10] 11 U.S.C. 107(b)

As the Agencies study the public availability of bankruptcy information, we urge them to consider these important judicial and constitutional traditions which allow for public access. As a matter of common law tradition, and constitutional guarantee, the information the debtor files to justify obtaining bankruptcy relief must be made available to the public, Only if the public has access to that information can confidence in the fairness of the system and the propriety of the relief be established and maintained. Therefore, the information must be available to researchers, scholars, and policy makers. Perhaps most fundamentally, the information must be available to any member of the public who may wish to access it for their own purposes, such as to influence the policy making process or as a monitor on the judiciary.

Creditors' Practical Need for Information

The Bankruptcy Code provides individuals who have voluntarily entered into a legally binding agreement, for the purpose of borrowing money from a lender, the opportunity to invoke a federal statute to eliminate the contractual obligation to repay that debt. The mere filing for bankruptcy allows the debtor to obtain the automatic stay which provides significant protections to the debtor at creditors' expense. This relief is provided virtually on demand — one of the only things the debtor must do to obtain the relief is to file the information detailing certain aspects of the debtor's finances.

The information filed by a debtor in connection with a bankruptcy case is essential to creditors who must use the information to determine whether and how to participate in the bankruptcy case. In fact, in most circumstances, the information filed by the debtor provides creditors the only basis for concluding whether they are entitled to any recovery from the debtor before the creditors' contractual rights are forever terminated. Due to the importance of the information, it is imperative that a creditor continue to have access to all bankruptcy information, with no restrictions, when that creditor's rights may be affected by the bankruptcy case.

The full range of bankruptcy information also is important to creditors that may need to consider relevant information, such as a bankruptcy filing, when evaluating financial and other risks. Congress has consistently recognized this need for access to data related to bankruptcy as part of fair and accurate risk assessment."

Bankruptcy courts also recognize the need for bankruptcy information in the private sector:

> "A bankruptcy filing is highly pertinent information to commercial enterprises.. Businesses must make daily decisions about entering into credit transactions with members of the public. The legitimate financial interest of businesses will be frustrated if the filing of a bankruptcy case is maintained on a confidential basis. The need of the public to know of the filing of the bankruptcy case.. .outweighs the debtors' desire to avoid the embarrassment and difficulties attendant to the filing of bankruptcy.[12]"

"See 15 U.S.C. 1681(a)(l), 1681c.

[12] In re Laws, 1998 WL 54182 I, at *715 (Bankr. D. Neb. 1998). See *also* In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994), Simmons v Deans, 935 F.2d 1287, 1991 WL 106160 (4"' Cir. 1991).

Not only is it important that the private sector have access to bankruptcy information, but the information must be in a form that guarantees the highest level of accuracy and consistency. The need for reliable data relates directly to the Agencies' desire for comment on the use of personal identifiers in bankruptcy cases, such as account numbers and Social Security numbers. These types of identifiers are of vital importance. Creditors must have access to these reliable identifiers, as they do today, in order to determine whether a particular bankruptcy case relates to a specific individual. Other more basic identifiers, such as name and address, simply are not reliable enough by themselves to establish a debtor's relationship with a creditor or other entity. Common names provide no reliability as to the holder of the account. Addresses provide only a minimal level of reliability as people change address often or list several addresses (e.g. a business address) on their accounts.

Not only will the lack of reliable identifiers severely hamper creditors' ability to conduct business, but the restriction on the availability of consumer identifiers will harm consumers as well. For example, without identifiers to ensure a match between a consumer and a bankruptcy filing (e.g. a Social Security number), one consumer's information could be erroneously associated with a consumer who has a similar name or address. Use of the more reliable identifiers, such as the Social Security number, generally ensure that information is matched with the appropriate account. Restrictions on access to the Social Security numbers, or other reliable identifiers, of debtors filing for bankruptcy will virtually ensure a new increase in instances where the bankruptcy tilings of some debtors are erroneously associated with consumers who have never filed for bankruptcy. Not only would the debtor filing for bankruptcy need to endure additional frustration and headaches with respect to an already troubling situation (i.e. the bankruptcy), but consumers who have nothing to do with a bankruptcy may suddenly find themselves having to restore inadvertently adjusted accounts and tarnished credit histories.

Although creditors have an obvious need for accurate and complete information, it is also important to note that many entities play a key role in ensuring that bankruptcy records are made available to creditors, researchers, lawyers and others in an efficient manner. For example, public record retrieval companies gather many types of public record information, including bankruptcy records, and make the information available more efficiently than can be achieved through other retrieval mechanisms. Not only is this an important service for those in the private sector, but it reduces the pressure on bankruptcy courts themselves since they generally do not have the resources to efficiently respond to requests from every party who may be interested in viewing each bankruptcy case.

Credit bureaus are similar to record retrieval services in that credit bureaus obtain credit-related information, including bankruptcy information, and compile it for use in credit reports. In order to manage credit risk, creditors rely on information provided by credit bureaus when evaluating a consumer's application for credit. In order for creditors to have the most reliable information possible, it is critical that credit bureaus have access to complete, reliable, and up-to-date information. If credit bureaus are denied access to any information filed in connection with a bankruptcy proceeding, it could severely damage the quality of credit reporting in the United States which, as Congress has recognized, would "directly impair the efficiency of the banking system."[13]

[13] 15 U.S. C. 1681(a)(I)

Conclusion

A combination of common law tradition, constitutional guarantees, and practical realities have supported the notion that information filed as part of a bankruptcy proceeding should be publicly available. Such information must be made available to the public as a whole as a fundamental tenant of our judicial system. Judicial records and documents must be available to the public in order to ensure the fairness and reliability of the bankruptcy system itself. Furthermore, the information is necessary for those who are or may be affected by a debtor filing for bankruptcy. Congress, recognizing these realities, codified the requirement that bankruptcy information was to be made public. In determining that certain information (i.e., trade secrets and defamation matters) be inaccessible, we believe that Congress considered the privacy implications of all information and decided that bankruptcy information be public,

Finally, we cannot stress enough that as the Agencies consider various proposals in connection with the Study, it is essential that the Agencies ensure that no changes are recommended that would limit the type or compromise the quality of bankruptcy information that the public, including creditors and other businesses, is entitled to receive.

* * * * *

CBA is very appreciative for the opportunity to provide our comments with respect to the Study. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to contact me. I can be reached by phone (703-276-3873), facsimile (703-525-0488) or email (msullivan@cbanet.org).

Sincerely,

Marcia Z. Sullivan
Director, Government Relations

Bank of America

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September 20, 2000

BY ELECTRONIC AND OVERNIGHT MAIL

Mr. Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW, Suite 780
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Re: Comments on Study of Privacy Issues in Bankruptcy Data (the "Study")

Dear Mr. Barnhill:

Bank of America Corporation ("Bank of America") appreciates the opportunity to respond to the Request for Public Comment on Financial Privacy and Bankruptcy, which was published in the July 31, 2000 Federal Register by the Department of Justice, Department of Treasury and Office of Management and Budget (collectively, the "Study Agencies"). Bank of America, with $680 billion in total assets, is the sole shareholder of Bank of America, N.A., the largest bank in the United States, with full-service consumer and commercial operations in 21 states and the District of Columbia. Bank of America provides financial products and services to 30 million households and two million businesses, as well as providing international corporate financial services for clients doing business around the world.

Bank of America, as a member of the consumer lending community, strongly advocates continued electronic access to information about the bankruptcy filings of its customers and potential customers. Only when such information is available in a timely, accurate and economical manner can consumer lenders act in accordance with federal law in curtailing certain actions following the filing of a bankruptcy. Adequate access to complete financial information about bankrupt debtors is also an essential component of a creditor's ability to participate meaningfully in the bankruptcy case and to ensure the protection of valuable legal rights.

Bank of America participated in the American Bankers Association's ("ABA") formulation of a comment responsive to the Study. The ABA letter succinctly outlines some of the practical issues presented by the Study and describes the likely impacts on various parties, including debtors, if public access to bankruptcy information is curtailed. Bank of America fully supports the views articulated by the ABA. The comment letter prepared by the Consumer Bankers Association ("CBA") similarly provides an excellent analysis of existing legislation and addresses the forfeiture of certain financial privacy rights by those who seek bankruptcy protection. Bank of America adopts the opinions included in the CBA comment letter.

Without limiting the scope of its support for the positions explained in the ABA and CBA letters, Bank of America would like to reiterate several key points and issues facing the lending community in connection with any debate on public access to bankruptcy information:

- Congress expressly legislated that bankruptcy papers filed in a case constitute public records and are to be "open to examination , . . at reasonable times without charge."[1] 11 U.S.C. § 107. The reality that bankruptcy data traditionally has been difficult and expensive for creditors to obtain demonstrates an historical failing in the practical administration of the federal bankruptcy system. The flaws of the past should not serve as a model to guide the future.

- Enhanced access to public bankruptcy records allows creditors to promptly recognize bankruptcy filings and to modify ordinary collections activities to comply with the automatic stay. Prior to the availability of electronic access to bankruptcy records, creditors faced numerous impediments in attempting to comply with bankruptcy laws. First, debtors frequently fail to use correct addresses for their creditors. Debtors often transmit bankruptcy notices to a "payment only" address, to the address of a corporate affiliate or to the stale address of a predecessor in interest. Without electronic access to bankruptcy records, creditors usually learn of an incorrectly addressed notice only after a stay violation has occurred. Even when a bankruptcy notice is correctly addressed, mailing the notice assures inevitable processing delays at the Clerk of Bankruptcy Court's Office, with the United States Postal Service and in the mail room of each creditor.

- Consumers seeking bankruptcy relief are afforded an unusual reprieve from the lawful collection efforts of creditors.. A debtor, who completes his or her bankruptcy and obtains a discharge, receives the extraordinary benefit of having legitimate debt substantially modified or wholly eradicated. Such benefit is beyond the scope of legal rights contemplated by the parties' contract and incorporates remedies that subsume traditional legal avenues of debt enforcement. Complete access to information related to the debtor's financial situation is essential to a creditor's ability to meaningfully participate in the bankruptcy process prior to the termination or modification of its legal rights.

Bank of America strongly believes that the administration of consumer bankruptcy cases has been and will continue to be vastly improved by the application of technology sources that enhance the public's access to bankruptcy information. This improvement inures not only to the financial benefit of creditors, but also assists consumer debtors in achieving more immediate recognition of the legal effect of their bankruptcy filings. Electronic dissemination of bankruptcy data, especially through third parties retained by institutional

[1] A party in interest may request the imposition of limited exceptions to the "open examination" of bankruptcy papers. The exceptions relate to trade secrets, secret or confidential research, development or commercial information and information of a scandalous or defamatory.nature. Accordingly, the exceptions are not relevant to the Study.

lenders, also relieves the administrative burden of the Bankruptcy Courts, which would otherwise be responsible for responding to creditor inquiries about individual cases.

Bank of America appreciates the opportunity to participate in the Study Agencies' comment process. If you have any questions regarding our comment, please contact Karen S. Williams, Associate General Counsel, at (704) 386-9647.

Sincerely,

Patrick M. Frawley
Director, Regulatory Relations

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September 18, 2000

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Re: Comments on Study of Privacy Issues in Bankruptcy Data
Prepared by the Privacy Rights Clearinghouse and Electronic Frontier Foundation

Dear Leander Barnhill:

The Privacy Rights Clearinghouse and the Electronic Frontier Foundation are pleased to respond to the Survey conducted by the Department of Justice, Department of the Treasury, and the Office of Management and Budget (the "Study Agencies") regarding the intersection of bankruptcy law and privacy issues.

The **Privacy Rights Clearinghouse** (PRC) is a nonprofit consumer information and advocacy program based in San Diego, California. It was established in 1992, and since that time, we have counseled thousands of consumers on a variety of privacy-related issues. Issues include identity theft, credit reporting, telemarketing, "junk" mail, Internet privacy, medical records, and workplace issues. The PRC responds to consumers through a hotline, written guides and a web site that is continually updated to include testimony given by the PRC in both state and federal forums on pending privacy legislation and administrative policy. See www.privacyrights.org .

At the core of the PRC's information and education program is the belief that all individuals have the right to control how their personal information is disseminated and used. This right is particularly important when the information at stake is personal financial information. This right to privacy should not be surrendered simply because of unfortunate circumstances that lead an individual into bankruptcy court. While the loss of control over personal information can be viewed in various ways with any number of results, the crime of identity theft is a most tangible result of the unfettered flow of personal information. For that reason, our comments are directed primarily toward this crime, although, as we later discuss, easy access to sensitive information will also make vulnerable debtors easy targets for a variety of scams.

Before responding to some of the specific questions posed in the survey, it seems appropriate to share some important facts on the increasing crime of identity theft, which is certain to be fueled by easy, on-

line access to personal financial information such as that required in connection with bankruptcy proceedings. First, the variations on identity theft are limited only by the imagination of the thieves involved. It occurs when someone uses bits and pieces of personal information about an individual, often the Social Security number, to represent him or herself as that person for fraudulent purposes.

The thief may use personal information to obtain a credit card, a loan, open utility accounts, rent an apartment or even to complete major transactions such as purchasing a car or a home. Based on information obtained from a 1998 U.S. General Account Office report ("Identity Fraud," Report No. GGD-98-100BR, 1998, p.40, www.gao.gov) and the Trans Union credit reporting agency (CRA), the PRC estimates the number of victims of identity theft this year alone to be 500,000 to 700,000.

A recent study conducted by the PRC in coordination with the U.S. and California consumer organizations U.S.PIRG and CALPIRG (Public Interest Research Groups) describes many of the problems and frustrations experienced by victims of identity theft. This study is available through the PRC web site at www.privacyrights.org/ar/idtheft2000.htm . As the study notes, victims of identity theft often spend years restoring their financial health, and in extreme cases, victims are astonished to learn that they have criminal records because an identity thief has committed crimes in the victim's name.

The **Electronic Frontier Foundation** (EFF) is the leading civil liberties organization working to protect rights in the digital world. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. EFF is a member-supported organization and maintains one of the most-linked-to Web sites in the world. See www.eff.org .

We join PRC in submitting these comments to highlight that bankruptcy proceedings are yet another area in which the law has failed to protect against threats to an individuals privacy in their personal information once that information has been transferred to a database and made available electronically. EFF therefore will comment specifically on the threats to privacy once personal information is made available on the Internet as well as the threats that storage of personal information in databases can create.

In response to specific questions posed by the Study Agencies, the PRC and EFF offer the following comments:

(1.5) Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

Social Security numbers (SSNs), credit card numbers, loan account numbers, dates of birth, and bank account numbers represent a gold mine to dishonest individuals as well as the rising number of organized criminal enterprises and gangs that specialize in systematic identity theft.

As previously noted, the Social Security number is *the* piece of personal information most commonly associated with identity theft. Our experience has shown that a thief, with access to no more than an

individual's Social Security number, can obtain a driver's license, open a new credit account, apply for a loan, and/or obtain a copy of the victim's credit report.

A thief with access to only one or two bits of personal information can easily use one successful instance of fraud, such as obtaining a driver's license, to acquire a collection of credit cards and bank accounts in the name of an unsuspecting victim. The frauds are often made easier due to the willingness of banks and credit card companies to change an address without independent verification. The circumstances we have described and our experience, we believe, illustrate just how easy it now is to assume the identity of another for fraudulent purposes. Still another online resource for thieves in the form of electronic bankruptcy information could only add to the ever-growing number of victims of identity theft.

Many of the federal bankruptcy courts make their documents available on the Internet *now* and at no charge. The SSNs of those individuals who file for bankruptcy are displayed in full on many of these web sites. This sensitive information should be redacted because of the risks of identity theft and other types of fraud to which these individuals are exposed. See, for example, www.caeb.uscourts.gov. Click on “Case Information,” then “New Case Filings,” and then select any date. You will see complete names and SSNs displayed.

As an aside, you might think that individuals who file for bankruptcy would not be at risk for identity theft because of their poor credit histories. But the PRC has talked with many individuals who have negative credit reports who have been victims of identity theft.

(1.6) How valuable is the information in the marketplace?

The sale of personal information in the form of so-called "credit headers," directed marketing lists and pre-approved credit lists has long been big business. The widespread use of the Internet has meant that virtually anyone can anonymously obtain the most personal details of an individual's life without limitation on how the information is used.

As the Study Agencies are no doubt aware, personal bankruptcy information is already available online from companies that specialize in selling lists and individual personal information derived from public bankruptcy records.

- One such company, National Bankruptcy Information, www.bkauthority.com , claims to be able to find "any document with the original case file" which it then "compiles [into] one large database."
- Two other companies also offer, again to anyone, lists of people who have filed for personal bankruptcy. One of these companies, International Technologies, Inc. (www.inft.net) claims its "Financial Hardships" database is "an excellent source for marketing leads."
- A third company, Discreet Research, Inc., www.discreetresearch.com , as well as International Technologies, Inc., offers a number of items of personal information about bankruptcy petitioners, including Social Security number.

There are many more such companies, and ease of access through online availability of entire bankruptcy files will surely increase the number of companies profiting from the sale of personal financial information.

Highly personal information such as that contained in bankruptcy schedules would no doubt be valuable to so-called "legitimate" information brokers and would likely result in annoying but relatively harmless intrusions in the form of increased "junk" mail and unsolicited telephone calls. More problematic, however, is the almost certain prospect that easy online access to personal bankruptcy information will prove a bonanza for identity thieves, unscrupulous telemarketers and fraudulent credit repair services. Other scams directed solely at those in desperate financial straits include the foreclosure scam, described in all its variations by the U.S. Government's Bankruptcy Foreclosure Scam Task Force (www.usdoj.gov/ust/fs03.htm). Such scams victimize not only the debtor but the bankruptcy courts as well by clogging the system with fraudulent filings.

3.A. Public Record Data

(3.6) Is there certain information that need not be made available to the general public, but could be made available to a limited class of persons?

The PRC and EFF recognize the long-standing principle that the public interest is served by open court proceedings, and that, in fact, public disclosure of bankruptcy proceedings is mandated by statute. However, we can conceive of no public interest to be served in a system that would readily subject individuals in bankruptcy to identity thieves and unscrupulous marketing. Access to an individual's personal information is obviously required in order for court personnel and bankruptcy trustees to do their jobs. But, access beyond this necessity to Social Security numbers, bank account numbers, credit card numbers and other personal information on the Internet would seem to be an invitation for abuse.

(3.8) Is there a need to make the following data elements publicly available: (a) Social Security numbers, (b) bank account numbers, (c) other account numbers?

No. See comments to question (3.6) above. Any argument that could be made in favor of a public interest in this very personal type of information would be far outweighed by the potential harm that would be done by making the information widely and easily accessible to anyone.

3.B. Non-Public Data

Neither PRC nor EFF is fully familiar with the work of bankruptcy trustees. However, as discussed further in (4.8) and (4.9) below, we believe easy online access to such records as tax returns and reports of investigation mentioned by the Surveying Agencies as information likely to be maintained in the files of bankruptcy trustees has the potential for serious harm to debtors and others as well.

4. A. Public Data

(4.1) Do debtors have privacy interests in information contained in public record data made available through the bankruptcy courts? If so, what are those interests? Do they vary by data element? If so, how?

The noble principle that fairness to all who come before the courts is best achieved through open proceedings, when coupled with technology and easy access to personal account and other information, has the unintended consequence of being not only unfair but potentially destructive. The end objective of bankruptcy court is, of course, to help restore the debtor to financial health and not to strip the debtor of all interests, including privacy, enjoyed by others. As we have said, the type of highly personal information at issue here, although now publicly available but difficult to obtain, will certainly prove a gold mine to criminals if and when access becomes effortless.

4. B. Non-Public Data

(4.8) What, if any, privacy interests lie in non-public data held by bankruptcy trustees?

The Surveying Agencies cite tax returns, investigations about wrongdoing and a debtor's payments to creditors as examples of the kinds of information maintained in the files of bankruptcy trustees. First, a person's tax return is one of an individual's most private documents. The Internal Revenue Service closely guards the privacy of taxpayer information to the extent that access to even IRS employees is only available on a need-to-know basis. A bankruptcy trustee's files made in connection with an investigation of wrongdoing would no doubt contain even more personal information about the debtor that would not otherwise be accessible to anyone.

Furthermore, an investigative file might also disclose the names of people interviewed during the course of the investigation and thereby infringe on the privacy interests of people other than the debtor. An investigative file would be likely to include conclusions and recommendations that may never ultimately be sanctioned by the courts. Public access to a debtor's record of payments under Chapter 13 bankruptcy just simply adds more unnecessary detail for those who have no need to know.

(4.9) If non-public data were made widely available to the public or to creditors for other non-bankruptcy purposes, what might be the consequences?

The consequence of widely available non-public data maintained in bankruptcy trustee files would be the same as that discussed in our answer to (1.5) above. Given the sensitivity of information that could be included in non-public data, we would expect this to result in increased instances of identity theft, increased contacts of debtors by unscrupulous marketers, increased contacts by fraudulent credit repair services, and an increase in other schemes such as the foreclosure scams.

(4.10) Are privacy interests affected if the distribution of non-public data bankruptcy information is for profit?

Yes. As soon as profits become involved, consumers will surely see a loss of privacy with regard to their financial records. As discussed previously in Section 1.6, personal information is quite valuable to

marketers. Personal information is often used to create profiles of individuals and the more information that is added to an individual's profile (see Section 5.1 and 5.2 for details), the more that individual is pigeon-holed into a particular demographic – rightly or wrongly. Bankruptcy information will be one more data-point.

Compounding the problem is that data collectors often view consumer data as their own -- and treat it accordingly. Access to information in profiles then becomes an issue. For example, during the discussions at the Federal Trade Commission's Advisory Committee on Online Access and Security, many of the marketers present felt that it was proper to limit access to consumer information by consumers. In fact, the most restrictive view of the panel would only allow access to personal information collected if the record itself could be changed. (www.ftc.gov/acoas.html)

5.0 What is the effect of technology on access to and privacy of personal information?

As discussed in our comments to question (1.6) above, personal information is a valuable commodity. This is evident from the number of companies that offer online sales of compilations of personal information characterized as mailing lists, lead lists, or marketing lists. And, again, there are already a number of companies that sell compilations of personal information specifically obtained from public court files in bankruptcy cases. However, as far as we have been able to determine, such companies offer Social Security numbers but not yet information about credit card or bank account numbers.

If bankruptcy and trustee files are available online to the general public, there should be some limitations on the types of information generally available. The public interest in open court proceedings as well as the privacy interests of debtors could both be served by limiting access to sensitive information to trustees and court personnel directly engaged in the administration of bankruptcy cases. This could be accomplished by use of passwords or other means to enable those with legitimate access needs to obtain the full text of the bankruptcy documents. For wider public access, the bankruptcy record should be limited to a *digest* of the key data elements. The *full text* of the documents should *not* be available via the Internet to the general public for reasons explained in previous sections.

(5.1) Do privacy issues related to public record data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?

Privacy issues regarding public records become magnified as more and more personally identifiable data are made available on the Internet because the availability of such data allows for more extensive profiling of individuals. Profiling allows corporations to create detailed dossiers about individuals' lives, which can lead to creation of markets for secondary uses of that information that the consumer could never have imagined. Few consumers realize the long-term privacy implications of these profiling practices.

Companies have been constructing very detailed profiles about their customers, storing the information they collect in databases where the information can be analyzed and merged with other databases. Bankruptcy information would be just one other category of information to be used in this way.

We are concerned that sharing and selling of personal information, including the additional data elements needed for the administration of bankruptcy proceedings and any resulting profiles based on that information, can have detrimental effects regarding activities that we take for granted in a free society, particularly in the area of free expression. Up until recently, we have had the freedom and ability to read and seek out information without being constantly monitored and identified. Now, pieces of information that had little meaning when viewed separately are now being aggregated, resulting in extensive profiling of individuals.

For example, the merger of companies Doubleclick and Abacus has given the new single company the ability to merge the online advertising database of one company with the offline direct marketing database of the other, thus marrying the offline and online behaviors of consumers into one database. The profiles created from information in the new database show a much more detailed view of individual consumer behavior than either of the separate databases could have shown alone.

Adding the personal information found in the public records from bankruptcy actions, including bank balances, income, and a detailed listing of assets, will only exacerbate the situation. Once consumers become informed of the extensive abilities of corporations to gather and profile consumers' online habits, including records that indicate their level of "financial health," consumers may be less likely to visit particular web sites, engage in e-commerce, or post to newsgroups, particularly if there are negative consequences, such as a potential employer gaining access to that profile and making hiring or firing decisions based on the contents.

The dangers of profiling are well expressed by Jeffrey Rosen, professor of law at George Washington University and author of *The Unwanted Gaze: the Destruction of Privacy in America* (Random House, 2000, p. 115):

> Privacy … protects us from being objectified and simplified and judged out of context in a world of short attention spans, a world in which part of our identity can be mistaken for the whole of our identity.

(5.2) Do privacy interests in non-public data change when such data are compiled electronically for ease of administration of bankruptcy cases? For commercial use? For other use?

As personal information finds its way into more and more commercial and governmental databases, the less individuals are able to control who has access to their personal information.

Creation of new databases

Easing the administration of bankruptcy cases may necessitate the creation of a new database containing the data elements necessary for the administration of those cases. The resulting databases will necessarily contain sensitive personal information about individuals that go through a bankruptcy proceeding. The information kept in the database would include both public and non-public information including bank accounts, credit card account numbers, Social Security numbers, and tax records.

We have noted the increased creation of national databases with little public accountability and few privacy protections. The Federal Bureau of Investigation (FBI) is scanning all of its paper fingerprint cards to create digital images and feeding them into the National Crime Information Center (NCIC) computer, which gets over two million queries a day. Attorney General Janet Reno would like to add DNA samples of anyone arrested to the NCIC database. The Federal Aviation Administration (FAA) has recently issued regulations that require the airlines to create profiles of everyone who flies to determine if a particular flier fits the profile of a terrorist. U.S. Postal Service (USPS) regulations also necessitate the creation of a new database to track those who use a Commercial Mail Receiving Agency (CMRA) as well as the CMRA itself. The proposed medical records rules under the Health Insurance Portability and Accountability Act (HIPAA) would also create a new national database. Information that is collected in a database to help in the administration of bankruptcy cases could be matched or added to any of these existing databases, thus adding to the profile of the individual.

There are some privacy protections associated with some of the above databases, particularly with the HIPPA, but they are generally weak. Without proper safeguards and enforcement, information collected for the ease of administration is also likely to find its way into corporate databases resulting in unintended uses of the information without the knowledge or consent of the individual. The general information at the beginning of the Federal Register notice itself states that "In addition, some trustees and creditors are considering compiling information contained in bankruptcy records electronically for easier administration of bankruptcy issues in which they have a claim. They may also envision some possible commercial use."

We therefore believe that the privacy interests in non-public data are threatened by the creation and use of these databases. Individuals continue to lose control over this information particularly when a corporate entity is involved.

6.0 What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?

A starting point when considering privacy protection is always the "fair information principles," or FIP. Several versions of the Fair Information Practices have been developed, starting in the early 1970s. We prefer the principles developed by the Organization for Economic Cooperation and Development (OECD) in 1980. (www.oecd.org//dsti/sti/it/secur/prod/PRIV-EN.HTM#3) The eight OECD FIP criteria are: collection limitation, data quality, purpose specification, use limitation, security, openness (notice), individual participation, and accountability.

We also prefer the FIPs developed by the Canadian Standards Association (CSA). These closely parallel the OECD Principles and the European Union Data Protection Directive. The CSA code contains these principles: accountability, identifying purposes, consent, limiting collection, limiting use-disclosure-retention, accuracy, security safeguards, openness, individual access, challenging compliance.

The Federal Trade Commission (FTC) has developed an abridged version of five FIPs. These are: notice, choice, access, security, and enforcement.

While "choice" regarding data use may not be workable in the context of public bankruptcy cases, as a minimum a published "notice" of the "routine uses" of personal information such as that required by the federal Privacy Act, 5 U.S.C. §552a, would advise bankruptcy debtors of the ways personal information could be legitimately used.

Debtors should also be given notice of the fact that information may be obtained, either online or by examining public court files, for commercial purposes by companies in the business of selling personal information. Public agencies should be required to provide a list of all the commercial information brokers to whom they sell bankruptcy records. If the debtor learns of errors in the documentation, he/she can locate the information brokers who have obtained the record in order to notify them of the errors.

In addition, information brokers should be required to keep records of the customers who obtain bankruptcy records on specific debtors. They too must be notified if they have obtained erroneous records. This is especially critical in cases of identity theft. Such record-keeping and error-correction provisions might need to be mandated by federal law, necessitating amendments to the Fair Credit Reporting Act (15 U.S.C. § 1681). The ability to trace who has accessed such records is part of the Fair Information Principle of "accountability."

We recognize that the judicial branch of government is not subject to the Privacy Act or the FIPs. We suggest only that these principles be used as a model to protect personal financial information in otherwise public documents.

A useful discussion of the Fair Information Principles can be found in an April 5, 2000 report, "Privacy Design Principles for an Integrated Justice System." This report was prepared by the Office of the Ontario [Canada] Information and Privacy Commission in collaboration with the U.S. Department of Justice, Office of Justice Programs. (www.ojp.usdoj.gov/integratedjustice/pdpapril.htm)

7.0 What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy, regulatory or statutory changes?

See response to Questions 5.0 and 6.0 above.

The PRC and EFF appreciate the opportunity to comment on some of the questions raised by the

Study Agencies. We commend the Agencies' recognition of the inherent contradictions in having the Government safeguard an individual's personal information in one context when considering that same information is easily available to any member of the public in another context.

Sincerely,

Beth Givens
Director, Privacy Rights Clearinghouse
1717 Kettner Ave., Suite 105
San Diego, CA 92101
(619) 298-3396
bgivens@privacyrights.org

Tena Friery
Research Director, Privacy Rights Clearinghouse

Deborah Pierce
Staff Attorney, Electronic Frontier Foundation
1550 Bryant St., Suite 725
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(415) 436-9333 x106
dsp@eff.org

Barnhill, Leander

From: Elizabeth Costello [elizabethco@UAWLSP.com]
Sent: Monday, September 18, 2000 12:54 PM
To: USTPrivacyStudy
Subject: Bankruptcy Privacy Issues

It is a wonderful convenience to have as much bankruptcy information available on the web as we do. I would like to see the complete cases scanned in. If there are worries about privacy, some of the information could be password protected with access tracked, so that attorneys and other legitimately interested parties would be able to get to the information, but the identity of who has accessed a certain case would be stored in the server in case some misuse of the information needs to be traced.

Elizabeth Costello, UAW Legal Services, Muncie, IN.

Via Electronic Submission

September 7, 2000

Mr. Leander Barnhill
Office of the General Counsel
Executive Office for United States Trustees
901 E Street, NW, Suite 780
Washington DC 20530
Email: USTPrivacyStudy@usdoj.gov

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

Please accept this letter concerning the Department of Justice, Department of Treasury and Office of Management and Budget's joint request for comment on their Study of Privacy Issues in Bankruptcy Data on behalf of the New Jersey Credit Union League ("NJCUL"). NJCUL is the trade association for almost 300 credit unions throughout New Jersey.

NJCUL is deeply concerned with the increased availability of consumers' personal data via the Internet. After significant consideration, we oppose any increase in the public availability of personal information which could potentially be used for identity theft or other fraud, whether this increased availability occurs in the bankruptcy context or not. The nature of bankruptcy proceedings necessarily subject the debtor to a certain amount of disclosure of personal information, but NJCUL opposes disseminating this information in a readily accessible, widespread medium such as posting creditor and asset schedules on the Internet. As we will detail more specifically below, NJCUL favors maintaining an appropriate level of disclosure while protecting debtors' personal information.

Privacy Interests of Debtors

In general, documents filed in a bankruptcy case are public information and "open to examination by an entity at reasonable times and without charge." 11 U.S.C. 107 (a). Debtors are required to file personal information such as social security numbers, birth dates, account numbers, identification numbers, financial balances and asset lists as a routine part of commencing a bankruptcy case. This means that this personal information, the same type commonly stolen or misappropriated by criminals when perpetrating identity theft, is open to examination by the general public. The potential for information misappropriation exists, but is justified by the need for full disclosure in the bankruptcy process.

To a certain extent, a debtor commencing a bankruptcy petition must trade the privacy of personal information for the relief sought. Under a cost/benefit analysis, the debtor chooses to initiate the bankruptcy because the cost of revealing personal information is less than the benefit of bankruptcy relief. A debtor discloses this personal information to his attorney with the understanding that the information will be disseminated to the bankruptcy court, the trustee, and

the creditors. Few, if any, debtors are aware this personal information is available to the public. It is unlikely that public access to this information at the local bankruptcy court would change a debtor's choice to file bankruptcy.

Making this information available on the Internet changes this analysis. Here, a debtor's personal information is available worldwide to anyone with a computer. Those who would perpetrate identity theft need not leave their home to initiate fraud against this debtor, they need only access the Internet. While the intent of posting this information on the Internet may be laudable, the unintended result of facilitating identity theft outweighs any possible benefits. Certainly, access to this information remains important to truly interested parties, but there is no weighty reason to make this information widely available to non-interested parties.

Furthermore, exposing debtors to a greater chance of becoming victims of fraud adds insult to injury because these individuals are already in precarious financial positions. Completed bankruptcy proceedings have the effect of destroying a debtor's credit rating. By exposing the debtor to an enhanced risk of identity theft, we risk subjecting those least prepared for financial hardship to higher risk of enduring it.

Debtors clearly have a greater privacy interest in any information which, if widely disseminated, could result in identity theft. NJCUL urges all agencies involved in drafting this report to provide for strong measures ensuring protection of social security numbers, birth dates, account numbers, identification numbers, financial balances, asset lists, or any other information critical to identity theft prevention.

Organizations in Bankruptcy

NJCUL is concerned with organizations in bankruptcy selling consumer information regarding former customers. As member-owned, not-for-profit financial cooperatives, credit unions have always been pro-consumer entities and do not typically engage in selling member information to marketing or other companies. We hope that all agencies involved in this study will examine this practice more closely and take appropriate action to ensure consumers' rights are adequately protected.

Thank you for your consideration. If you have any questions, please call me at the number listed above.

Sincerely,

Russell R. Clark

Russell R. Clark
President/CEO

Barnhill, Leander

From: sharmanmccarvel@juno.com@inetgw2 [sharmanmccarvel@juno.com]
Sent: Friday, September 15, 2000 8:54 AM
To: USTPrivacyStudy
Subject: FINANCIAL PRIVACY IN BANKRUPTCY

I made some comments previously, but I wish to add this one:

After thinking about WHY I felt so "naked/vulnerable" to have my social security number ,etc., known I remembered that in doing Licensed Daycare in Sacramento, County CA I WAS REQUIRED TO PROVIDE EACH CHILD WITH SOME PRIVATE SPACE TO STORE PERSONAL ITEMS and I OBSERVED how beneficial this was to a child's SENSE OF SECURITY.

And I remember thinking back then, that this really is a MAJOR difference between American Freedom and Communist--or other Oppression--THE RIGHT TO SECURELY OWN SOME PRIVATE PROPERTY. It seems to give one EQUAL STANDING and an EQUAL STAKE IN THE "BUSINESS" of the day.

And, this security, and standing, and EQUAL IMPORTANCE fostered a sense of a RIGHT to PARTICIPATE EQUALLY in the business going on, and fostered a CONFIDENT SHARING OF CREATIVE IDEAS; whereas, the lack of such, noticably contributed to an atmosphere of caos, and "push and shove" "survival" , i. e. lawlessness.

And I'm talking about a little 1'X1' cubicle to store a jacket or sweater and a few incidentals! This sense of a right to belong is very important to sewcurity and creativity and this is what I feel "stripped bare" of NOT JUST MY PRIVACY , BUT MY EQUALITY AND MY EQUAL RIGHT TO PARTICIPATE IN SOCIETY WHERE OTHERS HAVE PRIVACY OF THEIR FINANCIAL MATTERS. And I don't think it is NECESSARY to PUBLICLY EXPOSE ALL DETAILS--OR EVEN CONSTITUTIONAL--It just wasn't NECESSARY to take steps to protect privacy previously because the information was not easily availible. But now that it is, STEPS TO PROTECT EQUALLY THOSE FILING FOR BANKRUPTCY DEFINITELY NEED TO BE TAKEN. It is a grievous breach of ones AMERICANCITIZENSHIP on a very fundamental level--ones CONFIDENCE IN ONE'S RIGHT TO EQUALLY PARTICIPATE--to have ALL EXPOSED TO ALL. It strips one of this "SENSE OF EQUALITY AND CONFIDENCE TO FREELY PARTICIPATE" that is so essential to participation in "American Life".

There are protections concerning credit reports and information for this reason--yet this court information does not conform to this clearly American Standard of Privacy regarding Finances.
Only those who need to know and are qualified to know should know the details.

Thank You and God Bless You.
Jesus Christ is Lord!

Sharman A. Mc Carvel

Barnhill, Leander

From: Mary_Jo_Obee@okwb.uscourts.gov@inetgw2 [Mary_Jo_Obee@okwb.uscourts.gov]
Sent: Friday, September 15, 2000 3:34 PM
To: USTPrivacyStudy
Subject: Comments on Privacy & Bankruptcy


Survey.wpd

Hello,

I **am submitting my formal comments through the attached WordPerfect 8.0 file. If you have any questions please e-mail or phone at 405-231-5652.**

Thank you,
Mary Jo Obee

1.0 What types and amounts of information are collected from and about individual debtors, analyzed, and disseminated in personal bankruptcy cases?

1.1 What types of information are collected, maintained and disseminated in bankruptcy?

The following types of information are collected, maintained and disseminated in bankruptcy:

Information on debtors:

- Sources and amounts of income;
- Description, location and value of assets, including any bank, credit union, brokerage or other accounts and account numbers, real estate and automotive vehicles identification;
- Detailed monthly expense statement;
- Identification of all creditors, the nature of the debts and amounts;
- Identification of religious affiliations through expense statements or through creditor lists;
- Identification of medical provider, and thus whether debtor or family member has chronic or acute illness and through the specialty of the doctor, the diagnosis;
- Listing of contents of the home, through Schedules B & C;
- Debtor's addresses for the three years prior to filing;
- Debtor's social security or tax identification number;
- Debtor's address and telephone number;
- If debtor is a business, customer descriptions and identification lists;
- Patient and insureds lists for insurance and medical provider debtors;
- Identification of publications read, through **naming** of publishing creditors on lists and schedules.

Information on.creditors;

- Information which can be complied across multiple cases to give a picture of a firm's account receivable or a bank's exposure to nonperforming loans;
- layout an contents of forms and contracts used by creditors with its customers.

1.2 Which of these data elements are public records data?

All of the data elements listed above are public records data. They are included in the petition, schedules or statements, or proofs of claim.

1.4 How much data is at issue?

The personal identifiers are primarily at issue. All the rest of the data elements listed above are also at issue especially when linked to personal identifiers.

1.5 Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

Certain types of data are more sensitive than others. In all contexts, personal identifiers have been found to have the strongest sensitivity and be protected by the strongest privacy interest. Personal identifiers include: name, physical and e-mail addresses, telephone numbers, social security and tax identification numbers, photographs and any account numbers. As regards other information, one can assume that information which is considered sensitive in settings other than bankruptcy retains that sensitivity even when required by the bankruptcy system. Any information regarding medical services, including debts owed, is sensitive. Any information regarding religious or other affiliations is sensitive. All information about one's financial condition is considered sensitive. Any domestic information, especially anything concerning children is considered highly sensitive. All of these types of information acquire an extremely strong privacy interest when linked to personal identifiers.

1.6 How valuable is the information in the marketplace?

It is difficult to quantify the value of the information collected in bankruptcy in the marketplace. Not only is it difficult, but I fail to see how questions concerning collection and uses of data for a public purpose should be influenced in any way by how valuable access to the information may be for other uses, whether commercial or academic. Public money should not be spent for private purposes. The Supreme Court has also repeatedly made clear that just because data is collected and used for one public purpose does not mean that the information should be available for any access not related to the original purpose. See L. A Police Dem. v. United Reporting Publ'g Corp., 120 S.Ct. 483 (1999); Houchkins v. KQED, Inc., 438 U.S. 1 (1978); Zemel v. Rusk, 381 U.S. 1 (1965).

2.0 What are the current practices, and practices envisioned for the future, for the collection, analysis and dissemination of information in persona bankruptcy proceedings?

2.1 What methods of data collection and aggregation are now used by the courts, creditors, trustees and other private actors to collect, analyze and disseminate public records data and non-public data?

The courts currently use two methods to collect data in bankruptcy cases. The information is collected in paper documents or in electronically filed documents. Some of the information collected is aggregated into a database. This information is made up of the data on the petition and adversary cover sheets, creditor information from proofs of claim and, basically, the titles of pleadings. Information from the database is used to construct a docket header and docket entries. That same information entered by the electronic filer enters the same database when the filing is received by the court. The electronic document is also "aggregated" and available for viewing. In some courts, "aggregation" is

supplemented by images of the paper documents, which are available for viewing, One can search the database for specific names, debtor, judge, trustee and attorney as well as social security and tax identification numbers. Searches by specific creditor name are more difficult. The courts use the information from the cover sheets, without personal identifiers, in analysis as well as gross information by district on total filings and totals by types of filing. Docket entries are used by the court to determine dates for issuing discharges and final decrees. In those cases where a judge is involved, the judge uses the docket entries and specific pleadings, The docket header, docket entries and the documents are made available for general public access.

2.2 What methods are being contemplated for the future?

There are several changes contemplated for the future by the courts. First, it is anticipated that all filing will slowly become electronic and paper will become a smaller portion of the source of information collection. This has major future implications not so much in terms of data collection, but in terms of data "aggregation."

The second change contemplated involves charging for access to all electronic court records and charges to file electronically. Currently, access to all court records is free at the courthouse but searches and copying result in fees. Charging for access will result in some chilling of access of the general public to bankruptcy records.

The change flowing from electronic records with the most far reaching implications involves the upcoming ability to do a full text search of every document in the database no matter the specific debtor or case. Hiding the personal identity of a debtor or creditor will become increasingly dicult as the magnitude of the information in bankruptcy documents will be mined for the identifying clues within the contents. This upcoming change in search abilities should be a major point of reflection in any current debate on public access. It should narrow the choice between merely stripping personal identifiers from data and making all data available to the general public to a determination of whether access by the general public to documents with generally sensitive information, such as the petition and schedules, should only be allowed on a showing of a particularized need.

3.0 What access do various parties need to financial information in persona bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes and under what circumstances?

3.1 What entities currently access public record data?

Currently, debtors, named creditors, case trustees, attorneys, media, academics, title companies, credit bureaus, various lenders and to a much lesser extent, bankruptcy judges and the general public access public records data.

3.3 What specific data elements do they need and for what purpose?

The greatest number of requests for access to bankruptcy information come from the media and credit bureaus seeking access to case number, debtor name, address and social security numbers to publish and sell. To a much lesser extent, media ask for statistical information on the number and types of filings as well as the source and amounts of debts when researching stories on the bankruptcy system. Credit bureaus sometimes request discharge and closing dates to update their files to sell. Title companies seek the same personal identifiers as well as legal descriptions of real property to sell and use for title insurance policies.

The second highest source of requests for information received by a clerk's office come from creditors who have received a notice of commencement of case and are trying to associate the debtor with their specific accounts, establish the status of the case or are seeking legal information and advice. Their inquiries involve debtor name, social security number, address and case number, as well as discharge, conversion and closing dates. Their inquiries allow them to better participate in a case.

The next most number of inquiries come from trustees. Their requests are for access in asset cases to docket sheets, petitions, schedules, claims registers and proofs of claim. Next in frequency come creditor representatives in asset cases seeking access to the same information as trustees,

There are a few number of requests from debtors concerning the status of their case or legal questions. Their inquiries concern discharge and closing dates.

Finally, there are a very limited number of inquiries from members of the general public who have heard a particular person may have filed bankruptcy, did not receive a notice of commencement of case because they were not listed by the debtor, and are trying to ascertain if they are a creditor and should participate in a case. These parties provide personal identifiers to the court, name and generally an address or social security number, and ask for verification if that identified. person has filed a case. They ask the court for a case number, case status and in most instances for legal advice. The case number and status information allow them to participate in a case.

3.4 Are the purposes for which the information is sought consistent with the public interest?

To answer this question, one must define what is meant by the public interest in access to bankruptcy information. The interests of the general public in access to bankruptcy data are fourfold First, the general public has a "public interest" in access necessary to determine the efficacy of the bankruptcy laws. Second, the general public has a "public interest" in access to provide accountability of the individuals, including judges and trustees, who administer the bankruptcy laws and processes. Third, members of the general public have an "individual interest" to some level of access to determine if they are an un-named party to a specific case. Finally, the general public also have "commercial interests" which are private, not public interests, unrelated to the bankruptcy system.

The individuals who are named in a case have privacy interests in the information

about them contained in the case documents. They also have individual access interests to protect their rights under the laws as regards both the debtor and other creditors.

The number one accessors and users of bankruptcy information, media, credit bureaus and titles companies, are not using the information for purposes consistent with the public interest. These entities are using the information for commercial purposes. They print it and sell it or put it in a database of information and sell it. They do not use the information to evaluate the bankruptcy laws or administrators, or to research debtor or creditor fraud. Infrequently, the media will actually review bankruptcy information to research an aspect of bankruptcy law or to evaluate the actions of a trustee, judge, debtor or creditor. Access by the other parties listed in question 3.3 appears consistent with the public interests and protection of their individual interest under the law.

3.5 What data elements in public record data should remain public for purposes of accountability in the bankruptcy system? For other purposes?

There are very few elements of public data which can always be found able to remain public without limitation, The case number, county and state of filing, chapter, quantitative statistical information from the cover sheet, name and other information concerning debtor's attorney, name and other information concerning the trustee, name of the judge, dates time and place of all meetings and hearings, discharge,. conversion, dismissal and closing dates, listing of docket entries, case numbers and filing districts for other bankruptcy cases filed by the same debtor and possibly legal descriptions of real property and vehicle identification numbers of any automobiles can remain public. Access to pleadings would need to exclude the petition, schedules and lists and statement of affairs. All pleadings subsequent to the case opening documents would not include the debtor's name in the caption, or any identifying numbers such as the social security number or account numbers. Pleadings identifying sensitive information, such as medical creditors, would have to be redacted or excluded from access.

The three bases of public interest in bankruptcy data listed in question 3.4 provide the only purposes for which the general public should be allowed unlimited access to bankruptcy data. No other purpose can be given as a basis to use data acquired for a public purpose with public funds.

3.6 Is there certain information that need not be made available to the general public but could be made available to a limited class of persons?

Yes.

3.7 If so. what are these data elements, to whom should they be made available and for what purpose?

All information in a case, except possibly social security numbers and account numbers, could be provided to parties named in a case. This unlimited access could be provided on a time limited basis to comply with the substance of the Fair Credit Reporting Act, This type of access would be necessary for a party to

determine its interest in an estate and to participate in a case.
Unlimited access could be provided to the court, Office of the United States Trustee, case trustee and debtor and his/her attorney. Unlimited access to the court and U.S. Trustee and case trustee would allow for identification of fraudulent debtors and creditors. Unlimited access to a debtor allows the debtor access to information to correct credit bureau and other databases should they contain errors and complies with the spirit and substance of various legislation concerning identity theft and incorrect credit bureau information.

3.8 Is there a need to make the following data elements publicly available: (a) social security numbers. (b) bank account numbers. © other account numbers?
Unless a debtor has been determined to have engaged in credit fraud, none of these data elements should be available to the general public or to named parties in a case.

4.0 What are the privacy issues raised by the collection and use of personal financial and other information in personal bankruptcy proceedings?

4.1 Do debtors have privacy interests in information contained in public record data made available though the bankruptcy courts? If so. what are those interests? Do thev varv bv data element? If so. how?
Yes, debtors do have privacy interests in almost all of the information contained in bankruptcy court public records. Debtors, as do all individuals, have an overall, fundamental privacy interest in personal information. Privacy promotes liberty, providing the freedom to oppose tyranny of any kind. Liberty and individuality are the fundamental political and legal values of the Constitution and Bill of Rights. The right of privacy in personal information is protected against government intrusion through the Constitution. It is protected by the Fourth Amendment as found through Katz v. U.S., 389 U.S. 347 (1967) and Whalen v. Roe, 429 U.S. 589 (1977). It is also protected through the Ninth Amendment and the penumbra of the Bill of Rights.
The right of privacy in personal information against private intrusion is poorly protected. Most protection is provided by narrow, circumscribed statutes such as the Fair Credit Reporting Act.
The privacy rights of debtors do vary somewhat by data element. AU personal identifiers and information considered sensitive are provided more protection The information considered sensitive is listed in question 1.5 and includes most of the information in bankruptcy case opening documents.

4.2 What are the benefits of a public record system for court records in bankruptcy cases?
The benefits provided by general public access to bankruptcy records are difficult to quantify. There are five general categories of benefits of such access. First, general public access forces integrity in the bankruptcy system by placing all that happens under harsh public scrutiny. Second, flowing from forced integrity,

general public access helps to maintain confidence of the public in the bankruptcy system. Third, general public access allows "accurate, reliable data about the bankruptcy system" to be collected, aiding evaluation and speeding change to bankruptcy laws and processes. Fourth, access to all bankruptcy information by the general public helps lenders to make better informed decisions on extending new credit, contributing to efficiencies in the credit markets. Finally, access to all information in a specific case is necessary because the creditors are the new interest holders in the estate and are entitled to know everything, even otherwise private, about the debtor and estate in order for the bankruptcy process to work.

4.3 What are the costs of collecting and retaining data in bankruptcy cases?

The costs of collecting and retaining data in bankruptcy cases lie in two areas. First, the costs to the courts and, second, the costs in lost privacy to debtors, creditors and others drawn into the bankruptcy process. The cost to the courts is fairly simple to determine. Approximately 5 - 10% of clerk's office annual staff expenses and almost all of clerk's office annual rent for file space are associated with public requests for information and retention of that information. Approximately 1% of clerk's office automation expenses relate directly to providing public access. Add to these expenses the costs of keeping records at the Federal Records Centers, and the dollar amounts of collecting, retaining and providing access to bankruptcy records by the courts is quite large. Approximately 80 - 90 % of clerk's office annual staff expenses are associated with collecting, indexing and filing information brought to the court. This expense is arguably a sunk cost, because these duties must be performed to support the judges.

The costs associated with lost privacy rights of debtors, creditors and others drawn into the system is harder to quantify. There are six categories of cost or harm to privacy rights by general public access. First, unlimited access harms privacy rights by providing access greater than that necessary to the achieve the public benefit. Second, unlimited access under new technology chills those seeking redress under the bankruptcy laws. Third, unlimited access limits the fresh start by placing a stigma upon debtors. Fourth, current access levels result in inconsistent and discriminatory treatment of parties and information across federal causes of action. Fifth, unlimited access contributes unnecessarily to threats of physical harm to parties. Finally, unlimited access contribute unnecessarily to identity theft, credit fraud and lender redlining which would not occur with more limited forms of access.

The costs of the humiliation one suffers at a first meeting of creditors when stating that you are a defaulting debtor in front of a room full of strangers is difficult to quantify. The cost of a business being refused an extension of credit solely because a bank analyzed data on the creditor from bankruptcy cases is easier to quantify and even more harmful. The cost of freely releasing privacy rights greater than that necessary to meet the purpose behind granting public access is an insidious cost

4.4 To what extent do individuals who file for bankruptcy understand that all of the information contained in the public bankruptcy file is available to the public?
Individuals filing bankruptcy have no idea at all that anyone other than those listed in their schedules, the trustee and court will ever see their information. They certainly have no idea that the information will be available forever.

4.5 Should debtors in bankruptcy be required to forego some expectation of privacy that other consumers have under other circumstances?
As regards access to debtor information by the general public, no debtor should be required to give up one constitutionally protected right, to privacy, to avail themselves of another constitutionally protected right, to avail themselves of redress through the courts under the laws of the United States. "(t)here is no single divine constitutional right to whose reign all others are subject. When one constitutional right cannot be protected to the ultimate degree without violating another, the trial judge must find the course that will recognize and protect each in just measure, forfeiting neither and permitting neither to dominate the other." U.S. v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983). Any limitation of debtors' constitutional rights of privacy and to seek redress in the courts should be extremely narrowly tailored, especially when they are being limited by a claim to a common law right to inspect public processes and documents.
I can think of two times a debtor may have to forego privacy, to a limited extent as against his/her own creditors and if the debtor had engaged in fraud and frauds unknown. Other than these two instances, debtors' privacy should be no different than what is afforded the same information in other contexts.

4.6 Are there characteristics about debtors in bankruptcy that raise special concerns about wide public dissemination of their personal financial information?
The personal financial information of debtors in bankruptcy should be treated the same as that infomiation is treated for any other person. At the least, access to the personal fmancial information of debtors' should be accorded no worse treatment than similar information of criminals filed with the courts in pre-sentence investigative reports. .
In addition, one of the policies underlying the bankruptcy laws is that a debtor receive a fresh start. Wide public dissemination of sensitive debtor personal information raises questions concerning not only redlining, but shunning by members of the social community.

5.0 What is the effect of technology on access to and privacy of personal information?

5.1 Do privacy issues related to public records data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?
The issues of rights to privacy, what information is sensitive and the need to protect privacy do not change with the technical means of access. If information is sensitive and protected by privacy rights than access should not be allowed at all,

Barnhill, Leander

From: NorcalDivr@aol.com@inetgw [NorcalDivr@aol.com]
Sent: Wednesday, September 13, 2000 1:17 AM
To: USTPrivacyStudy
Subject: Comments on Study of Privacy issues in Bankruptcy Data.

John Bins
Box 5031
Santa Rosa, Ca. 95406
(707) 576-8161
(707) 569-0472 FAX
jbinns6269@aol.com

Dear UST,

I wanted to give my comments on the issue of privacy in bankruptcy cases. I am a strong believer in free and open public access to court information and believe that court documents should be public record except where a compelling need is otherwise demonstrated.

Court documents should be available to the public for many reasons including the fact that a review of court filings is the only means for a layperson to become educated in the subtle operation of the court system. I have personally used court filings to educate myself on an issue that I was personally involved in. The knowledge I gained from reviewing case filings enabled me to sucessfully manage my case in a way not possible had I not been able to study critical details of similar cases. I became a much more educated consumer of professional legal services.

I understand there are certainly abuses of unfettered public access to court records however I hope that any final decision will still allow individual citizens such as myself the opportunity to educate ourselves in ways that only such access can provide. Finally, there are always going to be abuses of the openness of a free and open society and access to court records is no exception. To some degree this may be one small price of freedom.

Sincerely,

John Binns

NAVY FEDERAL CREDIT UNION

Office of the President

PO Box 3000 • Merrifield VA • 22119-3000

September 8, 2000

Ms. Leander Bamhill
Office of General Council
Executive Office for United States Trustees
901 E Street, N.W., Suite 780
Washington, DC 20530

Re: Study of Privacy Issues in
Bankruptcy Data

Dear Ms. Barnhill:

Navy Federal Credit Union appreciates the opportunity to respond to the request for comments regarding the Study of Privacy Issues in Bankruptcy Data. Navy Federal is the world's largest natural person credit union with over $11 billion in assets and 1.9 million members. We serve Department of Navy personnel, dependents, and family members in every state and many locations overseas.

Access to financial information in personal bankruptcy cases should be improved. We rely on information collected by the courts to monitor bankruptcy proceedings and to facilitate the disposition of bankruptcy cases. To obtain the information, we currently use direct free Internet access, controlled Internet access via passwords administered by trustees, and a commercial database on a fee-per-use basis. On occasion, we experience difficulty in obtaining information from trustees. It is extremely important to maintain and even enhance the availability of accurate financial information obtained by the courts. If full information on personal bankruptcy cases were made freely available, we could more effectively administer our bankruptcy program.

Public access of financial information collected by the courts (including bankruptcy case trustees) is relevant and necessary to assure the integrity of the bankruptcy system. We do not believe any information that is currently available should be limited to certain classes of persons such as creditors. We believe limiting access to specific groups would prove costly, difficult to administer, and would curtail the availability of needed information.

Bankruptcy administration is made more efficient with electronic exchange of information. Greater access also ensures more effective checks and balances within the system, and makes it more difficult to conceal inaccurate, incomplete, and fraudulent information. We also believe the entry of commercial firms into the business of aggregating and disseminating financial information gathered by the courts could reduce the cost of bankruptcy and enhance the availability of information.

Social security numbers and account numbers should continue to be made publicly available.- These numbers are essential to all involved in the administration of bankruptcy cases for verification and identification purposes. We do not believe there are higher incidences of fraud because of public availability of these numbers. Typically, those involved in identity theft are not interested in assuming the identity of a person in bankruptcy. Also, financial institutions typically "close out," or change account numbers of bankrupt persons.

A request for society to absolve one's obligations through personal bankruptcy properly and necessarily brings personal information into the public domain. The public's right to know what is being legally imposed upon them outweighs the debtor's expectations for traditional views of the right to financial privacy. We believe many debtors do not understand the public nature of their bankruptcy information. Bankruptcy attorneys and bankruptcy courts should be required to clearly and conspicuously disclose the public nature of a bankruptcy filing. Many people admit the stigma of bankruptcy has greatly declined in recent years and more and more debtors are using the bankruptcy system as just another financial planning tool. Debtors must recognize that those who expect society to absorb the cost of their financial shortcomings through bankruptcy must inform society of their actions and forego normal expectations for financial privacy.

If you have questions, you may contact me at (703) 255-8203 or Bill Briscoe, Associate Vice President, Regulatory Compliance at (703) 255-7496.

Sincerely,

W. A. Earner, Jr.
Acting President

New Jersey League
Community & Savings Bankers
411 North Avenue East
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Telephone: *(908)* 272-8500 *Facsimile:* (908) 2724626 *E-mail:* Silkensen@njleague.com

September 8, 2000

Mr. Leander Barnhill
Office of General Counsel
Executive Office for the United States Trustees
90 1 E Street NW, Suite *780*
Washington, DC 20530

Re: Comments on Study of Financial Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

As a general policy, the New Jersey League – Community & Savings Bankers' supports efforts to protect the non-public, personal information of consumers of financial services and supports public policies that properly balance the legitimate information sharing needs of a financial institution with the obligation to protect consumer privacy.

With regard to the current study of what portion of the public information in bankruptcy records should remain publicly available, the Chairman of the League's Loan Servicing Committee is concerned that a community or savings bank ("bank") not listed as a creditor in a bankruptcy filing have access to sufficient information to identify if the person filing for bankruptcy is a potential debtor. To make that determination, banks heed to have access to the information currently available in the public file.

If a bank is a party to a bankruptcy, it needs full access to the non-public information as well. This information is critical in determining the size of the debtor's estate, the accuracy of the information provided, the other creditors with legitimate claims to the debtor's property, and the likelihood of recovery of the bank's claims from the debtor's estate.

We appreciate the opportunity to comment.

Sincerely,

James R. Silkensen
Executive Vice President

JRS/js

• The New Jersey League – Community & Savings Bankers is a trade association representing 70 of New Jersey's savings banks and savings & loan associations with total assets of over $50 billion and 3 commercial banks. The League's wholly-owned subsidiary, the Thrift Institutions Community Investment Corporation ("T.I.C.I.C.") assists League members in forming consortia to make loans on low-t&moderate income housing projects. T.I.C.I.C. has facilitated loans on over 3,100 affordable housing units throughout New Jersey and has loans in process on over 1,000 more housing units.

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September 8, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
Suite 780
Washington, D.C. 20530

RE: Comments on Study of Privacy Issues in Bankruptcy Data

On behalf of the members of Associated Credit Bureaus, Inc., we submit the following comments regarding the importance of public record bankruptcy data to our industry.

ACB, as we are commonly known, is the international trade association representing over 500 consumer information companies that provide fraud prevention and risk management products, credit and mortgage reports, tenant and employment screening services, check fraud and verification services, and collection services. Many of these products and services are governed under the federal Fair Credit Reporting Act (15 U.S.C. 1681 et seq.).

Consumer reporting agencies gather essential data from public records including records of bankruptcies. These data have a substantial bearing on a consumer's creditworthiness and are used in the production of consumer reports which in turn are limited to the uses allowed for under the FCRA.

Along with the facts of the bankruptcy case, it is important that our industry have access to full identifying information. The FCRA includes a standard of accuracy, which states that consumer reporting agencies must ". follow reasonable procedures to ensure the maximum possible accuracy of the information concerning the individual about whom the report relates." Absent access to identifying information, along With the public record, a consumer reporting agency simply cannot often meet the FCRA standard of accuracy in order to add bankruptcy case data necessary for risk management and banking safety and soundness.

To explain further our need for full identifying information when gathering bankruptcy data, in this country approximately 3 million last names change each year due to marriages and divorces, Further, 42 million consumers move annually. In combination these two facts mean that the challenge of properly identifying the subject of a public record is enormous and thus the necessity of using all elements of identifying information in meeting the duty to comply with the Fair Credit Reporting Act's standard of accuracy.

With regard to the other elements of the public record bankruptcy case, as described in the Federal Register notice, these data, such as account numbers, or account balances are, when gathered by a consumer reporting agency for purposes under the FCRA, a consumer report, As stated above, these data are thus limited to certain uses such as approval of an application for credit or an insurance policy,

The Federal Register notice itself points out that "Much of the information provided in connection with a bankruptcy case is similar to financial information that, in other contexts, such as banking and credit reporting, may be covered by a system of regulation designed to ensure the confidentiality of such information." We agree that the FCRA does ensure confidentiality.

In light of the extensive duties of consumer reporting agencies and consumer rights established under the FCRA to protect the confidentiality of bankruptcy case information, it is essential that our members continue to have access to these data for the production of consumer reports. Consumer reporting systems are the information infrastructure upon which the efficiency as well as safety and soundness of the banking system is built.

Sincerely,

Stuart K. Pratt
Vice President
Government Relations

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September 8, 2000

Leander Barnhill
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Sincerely,

Stuart K. Pratt
Vice President
Government Relations

MEMORANDUM

To: Joseph A. Guzinski
From: Professor Karen Gross
Re: Privacy Issues
Date: September 8, 2000

Pursuant to the notice in the Federal Register, I am emailing to you my comments in respect of issues dealing with PRIVACY AND BANKRUPTCY. These comments are not intended to be an all-encompassing discussion of the relevant issues. Instead, I hope my comments will alert your study team to some of the concerns that I have on this important subject. I would be happy to discuss these and related issues in greater depth and at greater length if that would be appropriate in the future. Please do not hesitate to contact me. (The memo starts on the next fill page.)

BANKRUPTCY AND PRIVACY: AN UNEASY INTERSECTION

Prepared by: Professor Karen Gross'
New York Law School
Sept. 8, 2000

Overview: Privacy is a hot topic these days. The topic has particular relevancy in the context of bankruptcy where debtors are required by law to disclose a plethora of information about themselves and their creditors.[2] Even a quick look at the Schedules and Statement of Affairs that debtors are required to complete to partake of the benefits of bankruptcy show the dimension of the problem. This is an area in which there are no easy answers to the clear tensions among the need and desire for (1) an effective bankruptcy process for the participants (to further the goals of the bankruptcy system); (2) transparency and accountability within the system; and (3) protection of personal and business privacy of debtors, creditors and others. It is an area in which technological advances have outpaced statutory constructs (both within and outside the bankruptcy arena) and where the "doable" has not, as yet, been measured sufficiently against the propriety of "doing" in the first instance. In short, the intersections of bankruptcy and privacy are paradigmatic examples of the collision of values that technology has wrought.

In thinking about this topic, I want to alert readers to several key issues that are of concern to me and certain of my thoughts in respect of them. I am not being exhaustive here but I do hope that these ideas will generate discussion and thought. I have not listed my concerns in rank order.

- **Section 107:** Section 107 of the Bankruptcy Code has received remarkably little attention, and until recently, has not been viewed as a particularly important provision. That is changing. Section 107 addresses two key issues: public access to documents fled in bankruptcy cases (designed to promote transparency) and situations in which privacy can be limited (designed to promote privacy and confidentiality). The section rests on the meaning of the words "public records" but the meaning of "public" has evolved since this section was originally crafted. Indeed, for me, the term "public" raises key issues since technology has both changed the scope of "publicness" and has enabled data mining and data configuration in ways not previously contemplated. Existing and prospective

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[1] Contact information: kgross@nyls.edu (email); New York Law School, 57 Worth Street, NY, N Y 10013-2960 (address); 212 431-2154 (phone); 212 431-1864 (fax).

[2] There is a useful new article on this topic that is worthy of a careful read (even though I disagree with certain of its conclusions). See Mary Jo Obee and William C. Plouffe, Jr., "Privacy in the Federal Bankruptcy Courts," 14 Notre Dame J. of Law, Ethics & Public Policy 1011 (2000).

expectations of privacy and publicness (by debtors, creditors and others) cannot be ignored. I suspect, however, that most pat-ties in interest have not altered their expectations in line with advancing technology (for a host of complex reasons including informational asymmetries).

Section 107 places the burden on the moving party to seek privacy/confidentiality protection (subsection b) and then proceeds to identify only two categories of protection, namely trade secrets and scandalous material (subsections (b)(l) and (b)(2)). This approach presents two problems. First, it presumes that concerned parties know enough to seek protection (and can afford to do so) and second, it assumes that the interest they want to protect is within the prescribed protective categories. Neither presumption is accurate. Parties in bankruptcy, particularly consumers (including those who appear pro se) or smaller creditors, may not be aware of their ability to move (assuming they could afford to do so) under Section 107. Moreover, even if they know they can so move, the applicable categories of protection are so narrow as to make protection difficult, costly and perhaps even unavailable.

It is my view that Section 107 needs to be revisited. Among other things, consideration should be given to: (1) what is and should be meant by "public;" (2) whether the exceptions to publicness are sufficient; and (3) whether the burden of proof needs to be shifted. I believe that the exceptions from **"publicness"** need broadening and that the burden of proof should not be on the entity seeking to invoke privacy. I also believe we ***need*** to develop ways to increase the awareness of those in the system about the privacy issues; this is largely a call for some educative remedy.

- Data Collected: There are lots of valid reasons for collecting information from debtors seeking bankruptcy relief. Among other things, data are needed to enable creditors to determine the size of the debtors' assets (including location) and the extent and nature of liabilities. It is also important to understand the nature and size of the creditor pool (type, number) for distributional and priority purposes. Moreover, creditors and other parties in interest need to have access to information about the debtor so they can protect their interests and maximize their respective recoveries. Data also disclose past fraud (or other bad acts) and discourage ongoing or prospective fraud (or other bad acts). There is a larger public purpose in data access; we need to know that the bankruptcy system is functioning fairly for all parties in the system, that eases are moving through the system, that parties are achieving the results to which they are statutorily entitled and that the judicial and administrative processes are protecting legitimate interests (e.g., due process, right to a hearing, right to a jury trial, an impartial judiciary, adequate representation, compliance with specific statutory timetables). For oversight bodies and academics, data are key to performing their work.

That said, we need to look more closely at the precise data collected (and not collected) to make sure that we are gathering information the collective "we" need. In some respects, current data collection in bankruptcy is at once over and under-inclusive. (There are issues of accuracy as well but I leave that for another day.) This is because there has no been a sufficient and sustained cooperative effort to assess the data needs of various constituencies. For example, those overseeing the court system need certain types of information to promote effective judicial administration (such as the speed of cases moving through the system; judicial workloads) while academics and creditors need another (to study the system's benefits or substantive malfunctions or to collect assets rightly available for distribution). Moreover, until recent technological advances, data about bankruptcy cases has not been readily available and, even with electronic filing, only disaggregated data are available. In other words, most individual case data is not being combined (using pre-selected variables) to determine local or national trends. So, for example, disaggregated data would show, on a case by case basis, the average credit card debt of each consumer debtor. Aggregated data could compile these results for all debtors in a region, a state or the nation, We need to assess whether and what personal identifiers must accompany both disaggregated and aggregated data that are disclosed. We may be able to limit certain types of information release (a debtor's name and social security number and an exact address), although some researchers may be uncomfortable with such a cleansing process (both in terms of accuracy and import).

It is my view that we need to reassess what data we should be collecting in the first instance and then the format in which that data can and should be made available to the different audiences that may want same – creditors, oversight bodies and academics, the public at large. Some cleansing processes need to be considered as viable options.

- **Privacy Inside and Outside Bankruptcy:** Apart from Section 107, there is little privacy protection directly within the bankruptcy laws themselves. However, external to bankruptcy, there is a growing body of law protecting privacy in a wide range of contexts. For example, under the Fair Credit Reporting Act, certain negative information about individuals is deleted after a specified number of years. Medical information about a person is required to be kept confidential by a doctor or medical facility. Some information is protected by court order; for example, an abused spouse can hide her address and employment location from the other spouse. However, in the bankruptcy arena, information that is protected elsewhere can, and in some instances must, be disclosed. Consider information about an individual debtor that is now available on line because of electronic tiling. This information is not deleted after ten years. A drug rehabilitation clinic that goes into bankruptcy may list its patients in their court filed documents as accounts receivable. A company in bankruptcy may list an abused spouse as a rightful creditor (with the creditor being unaware of the disclosure initially) and unwittingly disclose that person's address or place of business. Account numbers and social security numbers, regularly disclosed as part of a bankruptcy file, may not be readily

available in other instances. Information given in privacy or pursuant to promises of privacy are jeopardized by a bankruptcy filing as the interests of creditors are balanced against the interests of those disclosing information.

It is worth considering whether all information protected outside of bankruptcy should be stripped of those protections within bankruptcy. Moreover, as noted above, there is a dearth of information for debtors and creditors about the consequences of electronic filing. While a debtor or creditor may appreciate a public record in the traditional sense (going down to the courthouse to see same), they may not be aware of the access to data that may now exist. Education through disclosure has historically been the main form of consumer protection; however, disclosure is only a success if people understand what is being disclosed and have a way of responding to same.

It is my view that there needs to be a detailed assessment of the privacy protections accorded by non-bankruptcy law and how those protections are, if at all, impaired by wide access to bankruptcy files. Consideration should be given to identifying particular information that requires greater privacy protection.

Costs: Historically, the onus was on the party seeking information to pay for acquiring same and the cost of doing so sometimes curtailed legitimate data collection efforts. For example, a creditor wanting to see information from the debtor's schedules might have had to hire someone to go to the file room in the applicable court. Existing or prospective creditors are known to have hired "stringers" who gather information (at the creditors' expense) about individual debtors (who they owe, how much they owe, where they live). Potential purchasers of creditors' or equity holders' claims or the debtor itself have borne the cost of due diligence in most instances, mining the bankruptcy file for information.

The possibility of electronic access to data changes the cost dynamic. Instead of private parties exercising the time, effort and money to collect information, it is provided by the system – as a cost of the overall system itself. In other words, the costs of data collection are redistributed among all parties rather than falling upon selected interested parties with the desire or financial wherewithal to collect same. This is helpful to academics and others with fewer financial resources.

There is another dimension to this issue – the selliig of data. Although the data garnered are presumably "public," the data could be sold by the government, panel or Chapter 13 trustees (who also collect data) or third party collectors. The data could be re-packaged at a cost (aggregated based on variables suggested by the desirous recipient). Or, wholly unexpurgated files could be downloaded to another person's computer and reconfigured, recast or rerun. These data could be used by the acquirersthemselves (say to develop a list of potential customers or to identify where not to lend) or it could be cleverly re-packaged and re-sold to still others who might want same (other vendors, academics). This is problematic when public data are yielding economic benefits to those charged with

the responsibility of collecting it (as opposed to private parties who, themselves, pay to get and assemble data).

It is my view that clear policy positions on data ownership must be developed, and policies concerning both data access and **data dissemination determined. The ability to study the bankruptcy system cannot and should not be held hostage to the costs of data access; the system is far too large and important to deny the importance of its study. However, I remain concerned about the marketing of bankruptcy data, initially collected for one or more legitimate purposes, by those charged with collecting it.**

Conclusion: As an academic, I want and need data to determine and then write about the successes and failures of the bankruptcy system. Theory, of course, has a place but I have long believed that theory needs to be informed by actual practice -- as revealed by, among other things, hard data. Moreover, since there is widespread recognition that bankruptcy is practiced very differently in **different** parts of the country, national data (subdivided by region) is important and may yield **significant** insights into the functioning of the system. On the other hand, I care deeply about the privacy of those in the system, about their actual expectations of privacy and about their prospective safety. There is a human price for all debtors seeking bankruptcy relief That is true for many creditors as well. That price cannot rightly include the complete loss of privacy that we work so hard to protect in other arenas. One should only lose as much privacy as is needed to make the system operate well. I do not have answers unfortunately. However, I hope my concerns will assist the study team as **they** try to address this topic.

AMERICAN BANKERS ASSOCIATION
World-Class Solutions, Leadership and Advocacy 1875-2000

1120 Connecticut Avenue, NW
Washington, DC 20036

September 8, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
Suite 780
Washington, DC 20530

Re: Comments on Study of **Privacy Issues in Bankruptcy Data**

Dear Ms. Barnhill:

The American Bankers Association (ABA) is pleased to submit these comments in response to the joint request of the Department of Justice, Department of Treasury, and the Office of Management and Budget (the Study Agencies) published in the Federal Register of July 31, 2000. That request invited interested parties to comment on how the filing of bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The ABA brings together all categories of banking institutions to best represent. the interests of this rapidly changing industry. Its membership — which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks — makes ABA the largest banking trade association in the country.

Executive Summary

- The ability of new infarmation technology to make bankruptcy court data that already is public more readily and easily available should be viewed as a substantial improvement in the bankruptcy process.
- The use of the bankruptcy process to gain extraordinary legal relief includes an inherent loss of privacy as private financial matters become the province of the public sector judicial process.
- An individual who has filed for bankruptcy faces substantially less adverse potential consequences of public dissemination of personal financial information than a solvent individual.
- It is worthwhile to consider providing individuals with clear notice as to the inherent loss of financial privacy that accompanies a bankruptcy filing.
- Public policy should aim to maximize bankruptcy case data flows to all parties in interest.

- Creditors require detailed and timely bankruptcy information in order to both assert their own rights as well as to avoid taking actions adverse to the filer due to inadequate or dated information. Such information is also required to avoid new losses in those limited instances where individuals who have just filed for bankruptcy protection seek additional credit and fail to disclose that filing.
- As information technology improves data flows from trustees to the courts, there is a lessening of any meaningful distinction between public and non-public data.
- Bankruptcy courts sit as courts of equity and therefore must act in a manner that is consistent with other applicable laws and policies.
- Due to the lack of any demonstrated harm, as well as the administrative flexibility that the courts and trustees have to address any problems that do arise, it is premature to consider any statutory change in the Bankruptcy Code regarding data in cases filled by individuals or commercial bankruptcies in which commercial enterprises possess customer and consumer information.

Response to Questions

The threshold questions of this study must be: What are the legitimate privacy expectations of individuals filing for bankruptcy? And are the consequences of any loss of financial data privacy they may experience the same as for individuals who are not filing for bankruptcy?

We would submit that the financial privacy expectations of individuals filing for bankruptcy must, as a realistic matter, be far less than for individuals who do not use the system. This is due to the inherent nature of the process, which utilizes the intervention of a branch of the public sector, the judiciary, to block pending legal actions as well as to extinguish or substantially modify contracts entered into in exchange for credit. In addition to being part of the very nature of an open judicial process, it is desirable that the fact that an individual has filed for bankruptcy protection be disseminated as widely as possible, so that business and individual creditors of the bankrupt can avail themselves of available rights and remedies, and so that others who may be approached by the bankrupt for new credit may protect themselves.

When an individual files for bankruptcy he requests the extraordinary intervention of the judicial process. This intervention is highly unusual in two particular ways. First, an injunction, the automatic stay, is granted upon the mere filing of the petition and halts all pending legal actions against the debtor and his estate. This injunction is granted without necessity of proving the two elements that are usually required for such relief – a showing that immediate harm will be suffered absent the granting of the injunction, as well as a high probability that the petitioner will succeed on the legal merits.

In exchange for this extraordinary relief, the bankrupt must expect that the facts of this public judicial process will become just as public as those of any other civil action. The Bankruptcy Code in fact requires that all documents filed in a case become public records open to public inspection, and the fact that modern technology makes it easier for the public to examine such records should be viewed as a substantial improvement in the judicial process rather than a cause for concern. Given the highly mobile nature of our society, as well as the fact that the credit market is now national in scope, it is indeed appropriate that local bankruptcy court data be available at little or no cost on a nationwide basis.

Individuals who have filed for bankruptcy also, as a general matter, have substantially less exposure to misuse of their financial data. Unlike those of a solvent individual, the credit lines and accounts of a bankrupt will be restricted or closed and thus are not subject to misuse or appropriation by third parties who gain these account numbers.

Also, as a general matter, the Study Agencies' request for comment makes what we believe is an artificial and increasingly less meaningful distinction between public and non-public data. Information collected by trustees about the administration of particular cases is passed along to the courts at regular intervals and becomes part of the open, public record of the case; as information technology increases the speed and accuracy of these data flows, such data will more rapidly become part of the public record.

We now respond to the specific questions posed by the Study Agencies:

1) Types and amounts of information collected from debtors.

All deposit and credit accounts and identifying numbers, balances in savings and investment accounts, amounts owed on credit accounts, all sources and amounts of income, types and values of non-monetary assets, a budget showing the debtor's regular expenses, and the tiler's Social Security number, as well as any other relevant financial or living expense information becomes part of the public record in a given bankruptcy. Parties in interest require all of this information in order that they may avail themselves of their rights in a given case.

The fundamental balance at the heart of bankruptcy law is to provide necessary relief from financial obligations to the debtor while maximizing recovery to various types of creditors subject to the priorities and limits of the law. The only way to fairly achieve this balance in a given case is to make all available information freely available to all interested parties so that they may determine whether they have a stake in a particular case and, if they do, take appropriate action. We do not perceive any greater sensitivity of any particular class of data that would justify excising it from the public record or limit its availability. Aggregations of this type of data has some value in the marketplace, primarily through its dissemination to those who

regularly engage in the business of extending credit so that they may be quickly apprised of the facts and circumstances of filings by those they have lent to.

2) **Current and future practices for collection, analysis, and dissemination of bankruptcy case data.**

We are not aware of the full scope of current practices among the various court districts at this time, but would hope and expect that the Administrative Office of the U.S. Courts and the Executive Office for United States Trustees can provide that information. We are aware that various commercial enterprises now regularly collect basic public data about new bankruptcy filings, check it against the filer's credit histories, and provide notice to listed creditors subscribing to such a service that a borrower has filed for bankruptcy. The rapid availability of such data not only assists lenders in timely assertion of their rights in the bankruptcy process, but assists them in avoiding adverse actions against the debtor such as repossessions, setoffs, garnishments, and collection calls -- that might otherwise be undertaken, in unintended violation of the automatic stay, where the lender is not aware of the bankruptcy filing. In addition, it enhances the safety and soundness of the financial system by protecting lenders from extending credit to individuals who have just filed for bankruptcy but fail to disclose that fact on their loan application. It is our view that maximizing the collection and dissemination of bankruptcy case data benefits all parties to the process, including the debtor, and that the aim of the court system should be to use available and forthcoming information technology to improve such data flows.

3) **Need for access to bankruptcy case financial information.**

Creditors need detailed bankruptcy information and electronic information exchange services for several purposes:

- To make a threshold determination of whether a lender has a stake in a particular consumer bankruptcy. Again, such determination also better protects the debtor by preventing the taking of legal actions in violation of the automatic stay.
- To quickly ascertain the accuracy of **a** borrower's claim that they have filed for bankruptcy, where the communication fails to provide details of the filing. As in other instances, use of the borrower's Social Security number is the only means by which a quick confnmation of the claim can be effected.
- To communicate efficiently with trustees and obtain information about case status and payments made. Many trustees now make such basic information as debtor payments, change in status, modification of the plan, dismissal or discharge actions, and disposition of collateral available to parties in interest via Internet websites. Again, the availability of this data not only assists creditors, but helps protects debtors against adverse legal actions – such as a motion for relief from the stay -where the debtor has made timely payments but they have not been passed on by the trustee.

Lenders need access to all available debtor financial information about all account types, debts, income sources, expenses, etc. In particular, the debtor's full name, aliases, last known address and phone numbers, and Social Security numbers are essential in providing creditors with key information required to allow meaningful assertion of their legal rights, and such basic data must be readily available in a public manner. Such information also assists individuals to obtain credit by clearly differentiating them from bankrupt individuals having the same name.

Finally, we believe that the interests of all parties in bankruptcy would be well served if enterprises could collect, compile, and electronically redistribute information about bankruptcy cases. We strongly supported the provision of the pending bankruptcy reform legislation, 5.625, that would have permitted Chapter 13 trustees to provide case status data on a good faith basis to non-profit entities for redistribution to parties in interest, and were disappointed that the Administration objected to its inclusion in a final bill. It is our view that trustees should in fact be required to make data available to parties in interest via electronic means, and to share it with such a non-profit aggregation service; as previously stated, debtors would also reap substantial benefit if such information, particularly payment histories, was readily available to other parties to a case.

4) Privacy interests in bankruptcy.

As stated earlier, we believe that when an individual elects to use a public judicial process to extinguish or modify their financial obligations they must expect that the fact of their filing as well as detailed personal financial information will become part of the public record. A substantial loss of financial privacy is inherent in the bankruptcy process. Also, as earlier stated, the potential adverse effects of third party access to detailed financial data are inherently less in the bankruptcy context because the filing individual's credit lines will have been canceled or frozen, while their liquid assets are likely to be insubstantial or nonexistent. Any concerns about aggressive marketing of new credit to the debtor during or post-bankruptcy should be addressed through applicable consumer credit and protection laws, not by restricting access to bankruptcy data to the overwhelming majority of legitimate users. It must be recognized that post-bankruptcy rehabilitation and the "fresh start" must include the opportunity to build a new credit history; legitimate lenders who wish to offer credit to affected individuals should not face unnecessary obstacles to identifying them.

5) Effect of technology on access to and privacy of bankruptcy information

All of the information in a bankruptcy case is public information under current law. Information technology has the potential to make that public information more readily available to the general public. This should not be viewed as a flaw but as a substantial improvement in the operation of the public judicial process. Any attempt to restrict public access to such information would, in our view, be a misguided attempt to perpetuate preexisting inefficiencies and deterrents to public access.

We do, however, recognize one countervailing consideration. The ABA has repeatedly made clear that it supports limiting public displays of Social Security numbers because of the significant potential to perpetrate identity theft with that information. While it is absolutely critical that lenders continue to receive timely notice of the Social Security numbers of those who have filed for bankruptcy, we would not be adverse to limiting access to the general public. It must be recognized, however, that excising Social Security numbers from all public records of individual bankruptcy filings could constitute a major administrative challenge to the court system.

6) **Current business or governmental models for protecting privacy and ensuring appropriate access to bankruptcy records.**

We do not know of any models for protecting individual privacy in bankruptcy. Again, bankruptcy is an inherently public process in which the filer must anticipate that detailed financial information will become part of a record available to the general public. We do not believe that the potential for technology to improve such public access justifies removing various categories of data from the public record.

7) **Principles for handling bankruptcy data; recommendations for policy, regulatory or statutory change.**

We believe that the paramount public policy principle that should govern this area is that the utilization of technologies that better facilitate the dissemination of public information to the public should be viewed as a positive development and not as cause for concern. Easier access to this information that already is in the public domain is a highly positive development. We would oppose any attempts to transform currently available public information to information that is only available on a conditional or restricted basis, if at all. We would also oppose any proposal to restrict electronic access to information that is readily available in physical form, as such policy would only create unnecessary inefficiencies that would most severely impact small business and individual creditors. Finally, any attempt to restrict currently available data or electronic access thereto would likely impose substantial and unnecessary burdens on the court and trustee system.

We would have no objection to providing individuals contemplating a bankruptcy notice with clear and detailed notice about the public nature of bankruptcy filings, including the uses and disclosure of personal financial information by the court and trustees. Both Congress and the Administration have indicated strong support for policies, such as mandatory pre-bankruptcy credit counseling, to ensure that individuals fully understand all the legal, credit access, and personal implications of a bankruptcy filing, as well as available opportunities for financial rehabilitation outside of the legal process. Debtors should certainly have the same access to case information held by the trustee as other parties in interest.

We have no objection to, and indeed support, allowing public bankruptcy data to be aggregated and distributed by third parties for a reasonable fee. The market can best determine whether the value added to public information justifies the fee that is requested.

Finally, we think it is premature to consider any policy, regulatory or statutory changes in this area. Again, it is our overarching belief that the use of new technology to make already public information available more easily and efficiently represents a substantial improvement in the bankruptcy process. There has yet to be any demonstrated problem, much less actual harm, flowing from the availability of such information. The availability of this information both protects lenders and enhances the ability of solvent individuals to obtain credit. Many local newspapers have long published lists of new individual bankruptcy filings that include detailed public information, such as principal creditors and amounts owed, including child support. The Internet and other information technology improvements merely move those practices into the digital age. If any unforeseen and significant problems do arise, both the courts and the Office for U.S. Trustees have considerable administrative latitude to address them, and should attempt to do so before statutory change is considered.

Consumer Information in Commercial Bankruptcies

Although not a part of the formal Study, the Study Agencies invited comments about the effect of a business bankruptcy on consumer/customer information that the business has collected. This issue has recently received extensive attention in the media due to the attempt of the failed Toysmart.com retailer to auction off such information that it held. In July, Toysmart.com reached a settlement agreement with the Federal Trade Commission (FTC) under which it would be permitted to sell its customer database as part of its bankruptcy plan, subject to numerous conditions. Under the settlement, the information could be conveyed to a purchaser only if it was in the family-related commerce market, purchased the entire web site, and agreed not to sell the database without obtaining permission from the individuals included in it. Bankruptcy Judge Carol Kenner subsequently voided that agreement. She ruled, without prejudice, that any such agreement was premature in the absence of a buyer for the customer information. Judge Kenner noted that "the function of any court is to resolve actual conflicts" and that concerns about potential abuse of the database were hypothetical until a purchaser was identified. The Judge was responding, in part, to filings by creditors who asserted that the FTC terms were unduly constraining efforts to locate a purchaser, and who also noted that any disposition of the database asset would require notice to the FTC and approval by the bankruptcy court

The ABA believes that Judge Kenner reached the appropriate conclusion in this case. More generally, we note that bankruptcy courts are courts of equity with a long history of balancing bankruptcy law with other Federal laws and public policies. Bankruptcy courts cannot approve a sale that would violate other Federal laws, including consumer protection laws. Further, a court order is subject to strong enforcement

mechanisms and will generally provide greater protection to customers and consumers than any pledge made to them by the business prior to filing for bankruptcy protection.

The Study Agencies' request asked that comments not address pending legislative proposals or regulatory activities. While we will honor that request, we do note that, as a general mater, the highest degree of protection for the interests of a failed business' customers can be assured by leaving the bankruptcy court in control over those business assets that relate to their interests. Assets that are deemed to not be "property of the estate" cannot be used or sold by the debtor as part of its reorganization plan or for the benefit of creditors. Such non-estate assets may not be used as part of the debtor's regular business operations either prior to or after reorganization even where such use is consistent with its publicly stated privacy policy and applicable law, cannot be protected from misuse by third parties, and cannot be conveyed to a purchaser even where that transfer is part of a sale of the entire ongoing business and the buyer agrees to respect the failed company's privacy policy. Non-estate assets also fall outside the protection of the automatic stay and the jurisdiction of the court and could be subject to seizure and disposal by parties with claims against the debtor. Although an individual secured creditor might benefit from such action, creditors overall would be adversely affected because a valuable asset crucial to a successful reorganization or sale of the business would be lost to the debtor.

Bankruptcy policy favors maximizing the value of the estate for the benefit of creditors, including such parties as employees who are due back wages. It is important that this objective be carefully balanced against other public policy concerns. The bankruptcy court, acting as a court of equity, will generally be in the best position to balance such concerns based upon the specific facts and circumstances of a case. It is also important that consumer and customer information not be subject to more stringent conditions when a business seeks bankruptcy protection, as any resulting inability to utilize or realize the value of a key asset will be a strong deterrent to using the bankruptcy laws to reorganize. Such deterrence would tend to increase lost jobs, decrease creditor recovery, and harm the overall economy.

We believe it is premature. to consider any new law governing the use of customer and consumer data in the commercial bankruptcy context. We also believe that, as a general matter, applicable privacy law and policy should be the same regardless of whether a business is a viable going concern or is a troubled enterprise utilizing the bankruptcy process. Any legislative proposal for dealing with customer and consumer information held by a troubled company must be carefully considered to assure that it does not deter use of the bankruptcy process, conflict with the overall goals of bankruptcy, reduce the ability of the business to successfully reorganize, or undermine the ability of the court to safeguard the interests of individuals who have provided data to the company.

Finally, we note that certain self-declared privacy advocates have made public statements indicating that their advocacy of severe restrictions on the use of customer and consumer information in the commercial bankruptcy context is part of a broader agenda to prevent the exchange of customer information in all business mergers and acquisitions. Such broad legal restrictions on the ability to convey or use customer data would inevitably distort economic decisions, create unnecessary inefficiencies, and have significant negative repercussions for the overall information-based economy.

Conclusion

We appreciate the opportunity to comment and this matter. Please let us know if we can be of further assistance.

Sincerely,

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America's Community Bankers®

September 8, 2000

Mr. Leander Barnhill
Office of General Counsel
Executive Office for the United States Trustees
901 E Street NW, Suite780
Washington, DC 20530

Re: Public Comment on Financial Privacy and Bankruptcy
65 Fed. Reg. 46735 (July 31, 2000)

Dear Mr. Barnhill:

America's Community Bankers (ACB) welcomes the opportunity to respond to the request for public comment published in connection with a study on financial privacy and bankruptcy being conducted by the Department of Justice, Department of the Treasury, and Office of Management and Budget (OMB)[1]. ACB represents the nation's community banks of all charter types and sizes. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Study

The Clinton Administration is conducting a study, through Justice, Treasury, and OMB, of how best to handle privacy issues for sensitive financial information in bankruptcy records, including the privacy impact of electronic availability of detailed bank bankruptcy records containing financial information of debtors. The study will be prepared in consultation with the Administrative Office of the U.S. Courts.

The study examines the public record data and the non-public record data. The public record contains financial information as a part of schedules filed in bankruptcy court attached to bankruptcy petitions and related motions. This information includes: a list of bank accounts and identifying numbers, credit card account numbers, social security numbers, balances in the bank accounts, balances owed to creditors, income, a detailed listing of assets and budgets showing the individual's regular expenses.

This information is required for individuals filing chapter 7 or 13 under the Bankruptcy Code[2]. The Bankruptcy Code also specifies that all documents filed with the court are public records and open to examination by any entity without charge[3].

[1] 65 Fed. Reg. 46735 (July 31, 2000).
[2] 1 I U.S.C. 101 *etseq.*

On the other hand, the information held by the trustee in administering the estate – the non-public information – is not generally available to the public. This information may include additional schedules, tax returns, supporting information concerning the value of property or information relative to investigative reports.

Depending of the size or the value of the bankruptcy estate, the number of documents relating to a specific public or nonpublic filing can be enormous[4].

ACB Position

As a general proposition, ACB supports efforts to protect the non-public, personal information of consumers of financial services. While statutes, regulation and general industry practice provide a variety of privacy protections for financial services customers, ACB supports public policies that properly balance the legitimate information sharing needs of a financial institution with the obligations to protect consumer privacy.

Accordingly, ACB believes, in the bankruptcy context, that maintaining non-public data in its current form is necessary. Certainly, there is no overriding need to make publicly available the tax returns or additional non-public information obtained by the trustee to facilitate the settlement of a bankruptcy claim.

Recovery of Assets in Bankruptcy

In making a judgment as to what portion of the currently public information should remain available, ACB believes it is necessary to focus on whether, and to what extent, the information is critical in assisting community banks in recovering assets. If a community bank is specified as a creditor in a bankruptcy proceeding, all relevant information with regard to the case is available to the bank. It is conceivable, however, that a community bank may be a creditor of a consumer in bankruptcy and not be listed as a creditor.

When community banks are not listed, some public mechanism should be left in place to permit these institutions to identify potential debtors. The information in the public file should remain available to the public. Persons seeking bankruptcy protection must file detailed records. This disclosure may be a substantial inconvenience, but should remain a statutory requirement. After all, as compensation for these disclosures, the debtors receive a discharge from their obligations (chapter 7) or a substantially reduced debt burden and a discharge in three to five years (chapter 13).

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[3] 11 U.S.C. 107(a).

[4] Deborah Fletcher and Thomas Yoder, Bankruptcy – A Survival Guide for Lenders (America Bankruptcy Institute, 1997) 29-42.

General Issues

The study being conducted is extremely broad and a significant portion is beyond the operational purview on community banks. However, ACB would like to respond to several issues.

Should there be any restrictions on the degree of accessibility of such information, such as rules that vary if information is made available electronically or via the Internet? If so, what should they be? Should policies on the handling of information in bankruptcy cases be technology neutral, so that the rules for dealing with information are the same regardless of what medium is used to disclose such information?

Many jurisdictions are in the process of developing electronic filing and maintenance of the system of records. The bankruptcy proceedings in those jurisdictions would, of course, be subject to the same standards as other comparable court records. ACB believes that it would be extremely difficult to justify, from a practical or legal perspective, altering the contents of a file based upon its form. Therefore, it appears that the most appropriate method for handling the accessibility of this information would be on a technology neutral basis.

1.01 What types and amounts of information are collected from and about debtors, analyzed, and disseminated in personal bankruptcy cases.

The vast majority of personal bankruptcy filings include the following information:

- A list of creditors;
- A schedule of assets and liabilities;
- A schedule of the debtor's current income and expenditures';
- A statement of financial status;
- A list of exempt properties;

If the debtor has consumer debts that are secured by real or personal property of the estate, the debtor also must file a statement of intention which indicates whether: (1) the property is claimed as exempt; (2) the debtor plans to redeem the property; (3) the debtor intends to reaffirm the debt secured by the property; or (4) the debtor intends to surrender the property.

1.1 What types of information are collected, maintained, and disseminated in bankruptcy?

The bankruptcy court generally collects and maintains financial and personal data related to the debtor assets structure. This information is obtained to provide the bankruptcy court with adequate data to assess the financial status of the debtor, determine whether

the creditor's claims are equitable and to make a reasonable disposition of the assets consistent with the Bankruptcy Code and related rules.

1.2 Which of these data elements are public record data?

All of the iterris in 1 .01 are public record items.

1.3 Which are non-public record data held by the trustee?

As indicated above, all the items in 1 .01 are public record items. The non-public data is basically data developed by the trustee such as information emanating from an investigation, tax returns, supporting schedules, depositions taken to ascertain the propriety of certain filings, etc. Non-public information usually is developed on a case-specific basis.

1.4 How much data is at issue?

The amount of the data clearly varies with the size and the complexity of the bankruptcy. Generally, bankruptcy estates that contain a large number of real estate assets, securities holdings, or large commercial transactions generate significant data.

1.5 Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

ACB is not aware of any empirical surveys or consumer preference questionnaires that examine this issue.

2.0 What are the current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy.

The current treatment of information in bankruptcy is fairly regimented, although it may vary somewhat from jurisdiction to jurisdiction. The various schedules are filed with the clerk of the bankruptcy court. Thk clerk transports copies of the filings to the bankruptcy judge and his/her clerk. The clerk generally maintains an operational copy for his office and one for the court system.

Some jurisdictions are experimenting with electronic filing for all aspects of the court system including bankruptcy. Some jurisdictions permit paper and electronic filing. These filings extend to petitions, briefs, motions, and all pleadings. Conceivably, in the future, the courts could mandate electronic filing. The principal opposition to electronic filing has been the cost of converting the paper system to an electronic system. However, the privacy issue may become more prominent as the court systems consider conversion.

3.0 What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular type of information, for what purposes and under what circumstances?

Community bankers need access to all of the information in the public file. If a community bank is a party to the bankruptcy, it needs full access to the non-public information as well. This information is important because it assists the community bankers in determining the actual size of the debtor's estate, accuracy of the information provided, the number of other creditors with legitimate claims to the debtor property, and the likelihood of recovery of their claims from the debtors estate.

3.9 What issues, if any, are raised by existing limitations on trustees' handling of personal information?

One potential issue in this area relates to incomplete filing by petitioners in bankruptcy. For example, the debtor may **make** an incomplete filing or provide information in such a way that it is difficult to understand. In this instance, the bankruptcy judge has to start an investigation to determine the true nature of the debtor's estate.

As previously indicated, the evidence obtained from the trustee's investigation is non-public. However, during the course of the investigation, information may be obtained that would ordinarily be categorized as public information. Unfortunately, because the trustee was required to seek this information, it is placed in the non-public file.

ACB appreciates the opportunity to comment on the study. If you have any questions concerning this communication, please contact Al Elder at (202) 857-3 108 or aelder@acbankers.org.

Sincerely,

Charlotte M Bahin

Charlotte M. Bahin
Director of Regulatory Affairs
Senior Regulatory Counsel

DOLAN MEDIA COMPANY

Brian K. Long

National Group President

September 7, 2000

Leander Barnhill
Office of the General Counsel
Executive Office for United States Trustees
901 E. Street, N.W.
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Washington, D.C. 20530

RE: Comments on Study of Privacy Issues in Bankruptcy Data

We are pleased to provide the Departments of Treasury and Justice and the Office of Management and Budget with comments regarding privacy issues in bankruptcy data, under the terms of the notice appearing in the Federal Register of July 31, 2000, on pages 46735-46738. (Fed. Reg. Vol. 65, Number 147).

We request that the following general comments, along with the specific answers to individual questions, be made part of the public record.

Background of the Submitter

Based in Minneapolis, Minnesota, Dolan Media Company is the nation's leading collector of bankruptcy filing information. We monitor bankruptcy activity on a daily basis and provide information to our clients who are primarily the largest consumer creditors in the country. Our services provide a critical bridge between the bankruptcy courts and the creditors who are involved in a bankruptcy case. Our services also provide an indirect benefit to bankruptcy debtors as further described below.

In additionto bankruptcy records, we also collect a variety of public record information on consumers and businesses nationwide. The other types of information include tax liens, judgments, and UCC filings amongst others.

GENERAL COMMENTS

Need for the Study and Clarity in Discussing the Issues of Privacy

Dolan Media Company commends the Administration for undertaking this study of privacy issues in the context of bankruptcy data. The Company believes that this targeted effort represents an important step in bringing needed clarity to the complexities of the privacy debate.

The overall privacy debate has too often been characterized by scare headlines in the media; a one-size-fits-all approach to the protection of any and all information and data, regardless of its source and use; and little discussion or understanding of the delicate balance between preserving individual privacy and protecting the public's right to know.

Dolan Media Company hopes that the results of this Study will lead to a greater general public awareness of the need to balance privacy concerns with the necessity of public disclosure. In the particular case of bankruptcy data and information, the Company hopes that the Study will reaffirm the long-standing policy that such information must be made available to the public so that our economy continues to operate efficiently and all consumers are treated fairly.

Public Records Data and Privacy

In the United States, there will (hopefully) always be an uneasy balance between the right of privacy and the free flow of information. Both elements are necessary to the preservation of democracy, but the proper calibration between privacy, on one hand, and disclosure, on the other hand, very much depends on the specifics of each case, and a careful weighing of the costs and benefits in each instance.

Much of the current concern over privacy centers on private data collection activities involving Internet e-commerce sites, consumer mailing lists, etc. Applying privacy restrictions to such private data collection raises an entirely different set of issues than those that apply to public record data collected or generated by government.

And within the category of public records, there is a distinct difference between records for which consumers have an expectation of privacy – drivers license information, health care records,, and the like – and other public records which have traditionally remained open to public inspection and notice such as court proceedings, bankruptcy filings, tax and other liens, and similar matters.

There are deep-seated historic and wholly practical reasons for allowing open public access to this latter type of record. Historically, America was founded on the belief that government power should be limited, and that disclosure and open debate would protect us all. Consequently, we generally limit pretrial detentions, secret trials, and sealed records.

As a practical matter, the only reason to collect many public records related to economic condition or creditworthiness is to make this information available to the larger public. Without disclosure, there is no way to differentiate between an individual with bad credit and a checkered history, and someone with a stellar history of paying their

bills. Without this information being made readily available, the cost of obtaining credit and bank loans will go up for all Americans, and availability will become slower and more restrictive.

Uniaue Characteristics of Bankruptcy and Other Adjudicative Proceedings

In addition to the historic and practical reasons for generally allowing access to public records data, bankruptcy and other adjudicative proceedings have other characteristics that argue for disclosure, based on the fact that these events trigger the application of government power to an otherwise private situation.

In bankruptcy proceedings, as well as in other areas such as foreclosures, liens and court judgments, government power and decision-making is interposed between private commercial relationships. The application of that government power gives the public a compelling interest in the disclosure of those proceedings, in order to insure fairness and the proper use of government power.

Moreover, consumers who enter bankruptcy avail themselves of certain specific government protections not available to the citizenry at large. For instance, in most cases, their overall debt load is reduced and/or forgiven, a benefit unavailable to other consumers who carry large debts but who avoid bankruptcy. Individuals in bankruptcy are provided additional privacy protection unavailable to other citizens. Once an individual has entered bankruptcy, his or her creditors are prevented from contacting that individual to seek payment of debt. Again, this is a level of protection that the average consumer does not enjoy. It should be noted that this benefit is only available because of the public availability of data regarding the identity of individuals who file for bankruptcy.

Businesses and creditors to whom the bankrupt owes money may get *some* benefit in the form of reduced repayments that otherwise would never occur, but generally, bankruptcy is a benefit to the consumer and a cost to business.

In order to insure that the bankruptcy system works and is not abused, disclosure of information regarding the bankrupt is absolutely imperative in order to notify possible creditors of this status and, in some cases, to allow those creditors to challenge the filing. Beyond the immediacy of bankruptcy filing, it would seem only fair that consumers who have not filed for bankruptcy have this factored into their credit histories; and that those who have filed likewise have this taken into account. This can only occur if data regarding the bankruptcy is freely available to public.

How We Collect and Use Bankruptcy Information

The information we gather includes debtor name, address, social security / tax ID number, court location, case number, chapter, and other basic case information. All of the information we gather is public record information available within the initial petition and schedules that are filed with the court. Our primary source of this information is the bankruptcy court's computer system (often referred to as PACER). We also retrieve specific bankruptcy documents on behalf of creditors who need to learn more information about a particular bankruptcy proceeding.

In general, our clients are the largest creditors in the country who use the information for a variety of credit-related reasons. Creditors find that our electronic delivery of the information is more efficient and cost effective than paper based methods, and reduces the chances of error. We also provide bankruptcy information to the major credit bureaus to update the consumer's credit file.

The information we collect is used to alert the creditor of a consumer's bankruptcy. This use of the information allows the creditor to stop collection attempts to the debtor. Open access to bankruptcy information allows creditors to quickly remove bankrupt consumers from collection call queues, and collection letter mailings. This keeps the creditors from violating the automatic stay in regards to collection attempts that is effective at the time of the petition filing. To this extent, most debtors needing bankruptcy protection would have an interest in making sure their information is reported quickly and accurately.

The bankruptcy information is also used by the credit bureaus to update and maintain accurate credit files on consumers. These credit ratings help assure that those individuals who demonstrate the best history in terms of credit, are able to receive the most favorable credit terms. The credit bureaus are also able to use the information in ongoing fraud prevention efforts.

The very purpose of a bankruptcy filing is to notify others of the financial condition of the debtor. Our collection and distribution activities support this purpose more efficiently than any other solution today. Our clients can do a better job of controlling bad debt and avoid collection activity that violates the stay of bankruptcy. Additionally, the debtors' benefit by quickly receiving the protection they seek from harassment by debt collectors. Unrestricted access to this information will allow us to continue to serve both the creditors and debtors in an efficient and cost effective manner.

RUSSEL W. SCHRADER
Senior Vice President and
Assistant General Counsel

VISA

September 7, 2000

By Hand Delivery and Electronic Delivery

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
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Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

This comment letter is submitted on behalf of Visa U.S.A. Inc. ("Visa") in response to the request for comment issued by the Department of Justice, Department of Treasury and the Office of Management and Budget (collectively, the 'Agencies'? regarding financial privacy and bankruptcy records. The Agencies request comment regarding the privacy issues related to records established in the course of bankruptcy proceedings, including privacy issues raised by electronic access to such records. We appreciate the opportunity to comment on this important matter.

The Visa Payment System, of which Visa U.S.A. is a part, is the largest consumer payment system in the United States and in the world, with more volume than all other major payment cards combined. Visa is part of a worldwide association of over 21,000 financial institution members that individually offer Visa-brand payment services. In fact, Visa now has over one billion cards circulating worldwide. These Visa-branded cards are held by consumers around the globe, and generate over $1.6 trillion in annual volume worldwide and over $700 billion per year in the U.S. At peak volume, Visa's system processes nearly 4,000 card-related transactions per second. In 1999, the Visa network processed 11 billion credit card transactions worldwide.

As noted by the Agencies, when a debtor files for bankruptcy, the debtor is required to provide financial information as part of the schedules filed with the bankruptcy court -- such as a list of bank accounts and identifying numbers, social security numbers, a list of assets and liabilities and a budget showing the debtor's regular expenses. The information that is collected as part of the schedules becomes part of the public record of the case and is open to examination by anyone at reasonable times without charge (so-called "public record data"). In addition, trustees in the course of administering the cases often will find it necessary to add information in the bankruptcy schedules -- such as additional information regarding the value of the

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debtor's assets, amounts of liabilities and routine living expenses (so-called "nonpublic data"). This nonpublic data also includes information collected by a trustee relating to a debtor's Chapter 13 payment plan, such as a debtor's payments to creditors under the plan. As noted by the Agencies, generally only the parties in interest in a bankruptcy case -- including creditors that are involved in the case -- receive this additional information. The Agencies indicate, however, that there are no well-defined limits on the trustee's authority to provide nonpublic data to others, nor on the authority of such third parties to use, sell or transfer this information. The Agencies indicate that some trustees and creditors are considering compiling information contained in bankruptcy records electronically for easier administration and some possible commercial use.

General Comments

The public nature of bankruptcy proceedings is an inherent and important aspect of those proceedings. When an individual files for bankruptcy, the individual has chosen to involve the public sector -- including the bankruptcy court -- in his or her personal financial affairs. As with other court proceedings, the debtor should expect that the facts of this public judicial process will become part of the public record.

Creditors need access to public record data. Those creditors directly impacted in a bankruptcy case need access to nonpublic data so they can use the rights and remedies afforded to them through the bankruptcy proceeding. Other creditors need the public record data in case a bankrupt approaches them looking for new credit in order to underwrite the loan request appropriately.

The Agencies should not interfere with the ability of bankruptcy courts, trustees and others to compile and disseminate the debtor's public record data and appropriate nonpublic data electronically or by other means. In fact, the Agencies should encourage the use of such modem technology like the Internet to facilitate efficient distribution of this information to current and prospective creditors. This is what the Bankruptcy Code intended.

With respect to potential privacy issues arising from access by third parties to a debtor's data, any potential adverse effect is inherently less in the bankruptcy context than when the individual is solvent. When a debtor has filed for bankruptcy, the debtor's credit lines are likely to be canceled or frozen, and liquid assets are likely to be insubstantial or nonexistent.

To the extent that the Agencies are concerned that potential creditors will use bankruptcy data to market new credit to the debtor during or post-bankruptcy, these concerns are more properly addressed through applicable consumer credit and protection laws. Moreover, part of the "fresh start" provided by bankruptcy relief may include prudent use of credit by legitimate users. Recent bankrupts should not be denied credit because of restricted access to important bankruptcy data.

Creditors Involved in the Bankruptcy Case

It is essential that creditors involved in a bankruptcy case continue to have access to both public record data and nonpublic data relating to that case. Such creditors need all the data currently collected as part of the bankruptcy case in order to protect their rights. For example, a debtor's name, last known address and phone number and social security number enable a creditor to evaluate quickly whether the creditor has a significant stake in a particular case. In fact, in many cases, a debtor's social security number is the only way for a creditor to quickly ascertain the accuracy of a debtor's claim that he or she has filed for bankruptcy.

In addition, a creditor involved in a case must have access to other available financial information relating to a debtor -- such as the types of accounts, debts, income sources, and expenses -- so it may adequately evaluate its rights and determine what appropriate action to take with respect to the debtor. Moreover, with respect to Chapter 13 cases, a creditor involved must continue to have information from the trustee -- such as debtor payments, change in status, and modifications of the plan -- so the creditor can adequately protect its interest, as well as communicate with the trustee.

The Agencies should encourage bankruptcy courts and trustees to make public record data and nonpublic data available electronically (such as through the Internet) to creditors involved in bankruptcy cases. The electronic collection and dissemination benefits both creditors and debtors. For example, if a creditor is able quickly and easily to access bankruptcy information, a creditor may be able to avoid unintended violations of the automatic stay which adversely affect the debtor -- such as repossessions, setoffs, garnishments and collection calls -- that might otherwise be undertaken because the creditor is unaware of the bankruptcy filing.

Access to Public Record Data by Parties Not Involved in the Bankruptcy Case

All creditors -- even those that are not directly involved in a particular case -- should continue to have access to public record data regarding bankruptcy cases. Creditors that are not directly involved need this information to protect themselves when they are approached for new credit. Without this information, a creditor may unknowingly extend credit to an individual who has just filed bankruptcy -- which exposes the creditor to substantial unintended risk and may create safety and soundness issues for financial institutions. In addition, access by all creditors to public record data regarding bankruptcy cases actually can facilitate a debtor's "fresh start" after bankruptcy, by allowing legitimate lenders who wish to offer credit to debtors during or post-bankruptcy to identify those debtors more easily.

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August 24, 2000

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Leander Bamhill, Office of General Counsel
Executive Office for United States Trustees
901 E. Street, NW Suite 780
Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Counsel Barnhill:

I oppose any restrictions on the public's access to information held in bankruptcy filings. The current approach of openness is best. Our society benefits from public access to court records as transparency maintain the integrity of the system. Those who petition the bankruptcy courts for protection from creditors cannot possibly enjoy the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities. Since the Department of Justice estimates that one-fourth of all bankruptcy cases include fraud committed by the debtors, perhaps the next study should focus on ways to discover and prevent this wave of white collar crime.

Regards,

Richard Hamm
manager

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August 24, 2000

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Leander Barnhill, Office of General Counsel
Executive Office for United States Trustees
901 E. Street, NW Suite 780
Washington, DC 20530

Re; Comments on Study of Privacy Issues in Bankruptcy Data

Dear Counsel Barnhill:

I oppose any restrictions on the public's access to information held in bankruptcy filings. The current approach of openness is best. Our society benefits from public access to court records as transparency maintain the integrity of the system. Those who petition the bankruptcy courts for protection from creditors cannot possibly enjoy the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities. Since the Department of Justice estimates that one-four&h of all bankruptcy cases include fraud committed by the debtors, perhaps the next study should focus on ways to discover and prevent this wave of white collar crime.

Regards,

Steven J Wachtel

Email:
WEINVSTG8@aol.com

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August 24, 2000

Leander Barnhill, Office of General Counsel
Executive Office for United States Trustees
901 E. Street, NW Suite 780
Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Counsel Barnhill:

I oppose any restrictions on the public's access to information held in bankruptcy filings. The current approach of openness is best. Our society benefits from public access to court records as transparency maintain the integrity of the system. Those who petition the bankruptcy courts for protection from creditors cannot possibly enjoy the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities. Since the Department of Justice estimates that one-fourth of all bankruptcy cases include fraud committed by the debtors, perhaps the next study should focus on ways to discover and prevent this wave of white collar crime.

Regards,

Barnhill, Leander

From: Jay Lagree [K9Express@lycosmail.com]
Sent: Monday, September 04, 2000 11:49 AM
To: USTPrivacyStudy
Subject: "Comments on Study of Privacy Issues in Bankruptcy Data."

"Comments on Study of Privacy Issues in Bankruptcy Data."

Submitted by Jay D. Lagree
4 Guthrie Rd
Rehoboth Beach, DE 19971

302-226-1589
K9Express@lycosmail.com

Only "parties with interest", as determined by the bankruptcy court with specific jurisdiction over the case that includes collected personal information about me, should be able to access that information about me.

The "parties with interest" should never be allowed to use that information for any purpose other than those specifically associated with the bankruptcy being evaluated.

No information about me, whether public or private, should be transferred or conveyed from the company going into bankruptcy without my specific permission given AFTER the bankruptcy has been initiated. Without my permission, all personal information collected about me should be destroyed when the bankruptcy is finalized.

Barnhill, Leander

From: Steve and Beth Ziegler [topcat3@netcarrier.com]
Sent: Saturday, September 02, 2000 11:08 AM
To: USTPrivacyStudy
Subject: Comments on study of Privacy Issues in Bankruptcy Data

Sept. 2 2000

3.8) Is there a need to make the following data elements publicly available: (a) social security numbers, (b) bank account numbers, (c) other account numbers?

Bankruptcy is an overused financial tool that I think is abused in our country. Like welfare and disability, it has become an easy out for many making it hard on the ones that are truly in a bind & just need a little help for a little while. People rack up debt that they cannot pay, and after months or a few years of this they are overwhelmed, or just don't care anymore, & file bankruptcy. I have a friend that has done just that , yet their spending habits still are out of control. They continue on the same course as before the bankruptcy. They are spending the money that they actually still owe to the first creditors, though not legally. If the first creditors knew that this kind of money was coming in & out of these friends of mine hands, I'm sure that they'd be a bit angry possibly wondering, "they didn't have enough money to pay me, but they have enough money to go on lavish vacations and buy snowmobiles, pure bred dogs,expensive toys for their child,& hobby equipment?!"

In regards to the above question, I find it appalling that information such as the numbers above would even be questioned to become pubic information. This is the kind of information that makes up a person's identity. This information in the wrong hands, could Really mess up a person's life. Yet, if the creditors had the information it might make a difference. Public access, NO.....limited access to those who need to know yes WITH definite security measures.

A definite overhaul of the system is in definite need, as sited tin the first paragraph. if this is not your department, please pass it on to those dept. it is , and /or please keep it in mind for when it is your dept. Thank you for your time. I hope that this was helpful.

Sincerely,

Steve & Liz Ziegler

220 Indian Creek Rd.

Apt. A

Telford, PA 18969

(215) 721-2329

topcat3@netcarrier.com

UNIVERSITY OF HAWAII
FEDERAL CREDIT UNION
P.O BOX 22070
Honolulu, HI 96823-2070
TELEPHONE
(808) 983-5500

UNIVERSITY OF HAWAI'I
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P. O. BOX 22070
Honolulu
Hawaii 96823-2070
Paula Sumimoto
Training & Compliance
Coordinator
Telephone
(808) 983-5500

August 29, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street NW Suite 780
Washington DC 20530

RE: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

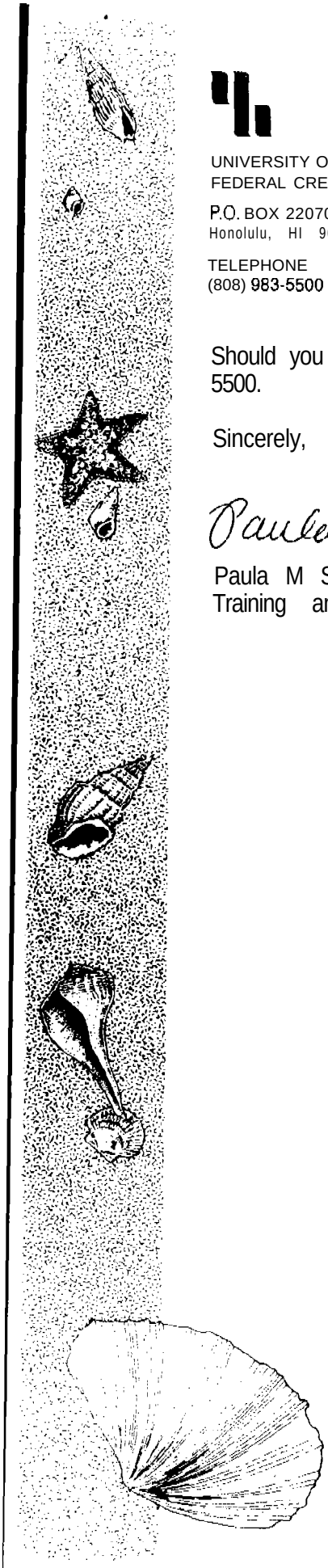
Thank you for allowing us the opportunity to comment on such a controversial and complex issue.

We are highly sensitive to the consumer's desire for privacy on information publicly available during a bankruptcy case, but the need for access to this information and accountability in the bankruptcy system still exists.

Information is collected on the individual debtors in personal bankruptcy cases and is used by various creditors and credit reporting agencies to create credit-scoring models and bankruptcy predictors. These models aid the creditors with a guideline to avoid potential losses and assist in making safe and sound operational decisions, however no model is 100% foolproof. But the need for access to the information assists in fine tuning the models and indicators to operate effectively and efficiently.

Debtor's social security numbers should also be available to prevent information from being recorded under individuals with the same name - - i.e. John Doe, John Doe Jr. and Jon Doe. Without access to this information it will have a direct impact on operations and the integrity of the information. Other account numbers, such as bank accounts, etc. may be deemed protected information.

All of the information collected by the trustee is critical for the trustee to make a fair decision on the debtor's disposition. In most circumstances, debtors should not have a privacy issue in this non-public information section, Disclosures should be made to all debtors that information collected during a bankruptcy proceeding is publicly available. Such access to information should not change with electronic media.



UNIVERSITY OF HAWAII
FEDERAL CREDIT UNION

P.O. BOX 22070
Honolulu, HI 96823-2070

TELEPHONE
(808) 983-5500

Should you have any questions, please do not hesitate to call me at (808) 983-5500.

Sincerely,

Paula M. Sumimoto

Paula M Sumimoto
Training and Compliance Coordinator

Barnhill, Leander

From: sharmanmccarvel@juno.com@inetgw2 [sharmanmccarvel@juno.com]

Sent: Monday, August 21, 2000 3:41 PM

To: USTPrivacyStudy

Subject: Bankruptcy/Private Financial Information

NUMBER ONE RE:INCOME INFORMATION VIOLATIONS:

I receive SSI. However, since I had worked part-time and was married to a spouse who worked, we had a high income (for us). As a result we were BOMBARDED by UNWANTED, UNSOLICITED credit card offers based upon THEIR HAVING ACCESS TO OUR PRIVATE INCOME INFORMATION-- THAT WE DID NOT GIVE TO THEM! Who has allowed them to JUST-- HAVE-- THIS INFORMATION WITHOUT OUR PERMISSION? Who has SOLD our PRIVACY and INDEPENDENCE " up the river"? THIS IS OUR DECISION! WHO HAS "RAPED US OF THIS..."UNDER FORCE AND COLOR OF LAW"???

They should only be able to get this information , FROM US, or as a result of receiving our WRITTEN PERMISSION TO BE GIVEN IT! HOW ARE THEY GETTING IT! This "hole in the dyke" of our PRIVACY and AUTONOMY needs to be "PLUGGED".

This is OUR INFORMATION, IT BELONGS TO US. Who is "TAKING IT WITHOUT PERMISSION"? That is STEALING! Whoever is doing this is VIOLATING OUR RIGHT TO PRIVATE POSSESSION OF OUR INFORMATION.

This is not a LEGITITMATE GOVERNMENT NEED--TO USURP OUR PRIVATE INFORMATION RE INCOME, TO GIVE TO PRIVATE USERERS, TO PREY UPON PERSONS UNDER FINANCIAL STRAIN. NOR IS IT GOOD PUBLIC POLICY TO ENCOURAGE PERSONAL DEBT. WHO IS DOING THIS? THEY NEED TO BE STOPPED! This is governmental systemic "rape" of PRIVACY! Please stop it!

NUMBER TWO RE: BANKRUPTCY/SOCIAL SECURITY NUMBER:

I was quite shocked to phone in to the "voice information system" and hear it read my social security number off to me. THIS IS A VERY SERIOUS "RAPE" (TAKING BY FORCE AND COLOR OF LAW) OF MY PRIVACY.

MY SOCIAL SECURITY NUMBER IS NOW PUBLIC INFORMATION!

IS THAT ABSOLUTELY NECESSARY??? I DON'T THINK SO! SURELY WE ARE INTELLIGENT ENOUGH TO FIND A WAY AROUND MAKING PEOPLE'S SOCIAL SECURITY NUMBERS PUBLIC INFORMATION!

THE MONETARY SYSTEM IS TO SERVE THE PEOPLE--NOT THE OTHER WAY AROUND--WITH PEOPLE VIOLATED--THEIR PRIVACY--THEIR AUTONOMY-- TO SERVE THE CONVENIENCE OF THE MONETARY SYSTEM.

I FEEL NAKED--LAID BARE--STRIPPED OF SAFETY--AND VERY VULNERABLE TO FURTHER SERIOUS VIOLATION.....PLEASE CLOTHE ME WITH SOMEKIND OF PROTECTION FOR MY FINANCIAL PRIVACY CONCERNING MY INCOME AND SOCIAL SECURITY NUMBER . THAT INFORMATION IS FOR ME TO GIVE OUT, AS ABSOLUTELY NECESSARY--TO KNOWN, AND TRUSTWORTHY PERSONS. IT SHOULD NOT BE MADE PUBLIC! THAT IS WHAT MY BANK USES TO MAKE MY BANK ACCOUNT PRIVATE.

MASSIVE COLLECTION OF SOCIAL SECURITY NUMBERS, I THINK , IS A NATIONAL

SECURITY ISSUE BECAUSE THEY COULD BE USED ON AN INDIVIDUAL BASIS--BUT THEY COULD ALSO POSSIBLY BE USED BY A COMPUTER ON A MUCH LARGER SCALE TO CAUSE A SERIOUS DISASTER--LIKE THE SUDDEN WITHDRAWLS THAT CAUSED THE STOCK MARKET TO CRASH.

I FEEL SERIOUSLY UNSAFE.

I'M NOT SURE EXACTLY WHY. BUT IF MAKING EVERYONE'S SOCIAL SECURITY NUMBER PUBLIC IS SO SAFE--WHY NOT JUST PUBLISH THEM IN THE NEWSPAPER?

WHY WERE THEY MADE PRIVATE IN THE FIRST PLACE?

CRIMINAL MISUSE???....IT'S OK FOR ME TO BE CRIMINALLY MISUSED BECAUSE i'M IN BANKRUPTCY NOW? AND FOREVER AFTER???EVEN IF I GET BACK ON MY FEET MY INFORMATION IS VULNERABLE TO MISUSE--AND THAT'S OK?

NOT TO MENTION THAT THE TINIER MY "ASSETS" THE MORE VULNERABLE I AM TO HARM FROM VIOLATION--NOT LESS VULNERABLE TO HARM.--AS IN --KEPT FROM BEING SUCCESSFULLY INDEPENDENT AND PROSPEROUS BY SMALL HARRASSMENTS --LIKE THE 3 UNLAWFUL DETAINERS THAT, THOUGH I AM INNOCENT OF WRONGDOING AND PAY MY RENT, HAVE "RAPED" ME OF MY ABILITY TO GET HOUSING ...THE FIRST AN ASSAULT OF EXTREME NOISE ALLOWED BY SACRAMENTO CITY CODE--THE SECOND-- "I DON'T WANT YOU TO PAY RENT-- SO I CAN MAKE YOU MOVE--WITHOUT ANY JUST CAUSE" THE THIRD--BECAUSE THE NOTICE FOR THE FIRST WAS INVALID (SLANDEROUS) .EQUALS NO HOUSING!

I PAY MY RENT. I JUST CANNOT AFFORD TO MOVE, AND MOVE, AND MOVE, DUE TO LANDLORD WRONGDOING AND GREED. I HAVE THE RIGHT TO BE TREATED WITH RESPECT AND HAVE MY SITUATION RESPECTFULLY CONSIDERED AND REASONABLY RESPONDED TO, BUT THAT IS NOT HAPPENING.....

NO HOUSING--NO FINANCIAL PRIVACY--NO SOCIAL SECURITY NUMBER PRIVACY....

I AM NOT AN ANIMAL! --I HAVE NO FUR COAT!--TO BE EXPOSED TO THE ELEMENTS!

I BELONG TO MYSELF--NOT EVERYONE ELSE! AND SO DOES MY FINANCIAL INFORMATION. ONLY MY CREDITORS NEED TO KNOW SOME NAMES AND ADDRESSES--THEY DON'T NEED TO KNOW EVERYTHING! ESPECIALLY NOT MY SOCIAL SECURITY NUMBER. THAT IS WHAT THE TRUSTEE IS TRUSTED WITH!
THE VULNERABLE INFORMATION! IT'S NOT THAT HARD TO PUT ANY SENSATIVE INFORMATION IN A PLASTIC PUCH MARKED CONFIDENTIAL IN THE FILE! IS IT?

WE ALL GET DRESSED IN THE MORNING DON'T WE?

LET'S CLOTHE THE "NAKED" HERE.

AND ONLY EXPOSE THAT WHICH IS ESSENTIALLY NECESSARY--NOT EVERYTHING.
OK?

STARTING TODAY.

THANK YOU, SHARMAN A. MC CARVEL

OFFICE OF JUDGMENT ENFORCEMENT
1436 W Gray St # 272
Houston TX 770 19-4946
VOX 713.529.4279; Fax 713.529.9864
wfason@houston.rr.com

15 August 2000

Leander Barnhill, Office of General Counsel,
Executive Office for United States Trustees
901 E Street, NW, Suite 780
Washington DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

I oppose any restrictions on the public's access to information held in bankruptcy tilings. The current approach of openness is best. Our society benefits from public access to court records as transparency helps maintain the integrity of the system. Those who petition the bankruptcy courts from protection from creditors cannot have the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities. Since the Department of Justice estimates that one-fourth of all bankruptcy cases include fraud committed by the debtors, perhaps the next study should focus on ways to discover and prevent this wave of white collar crime.

Regards,

William E. Fason
Owner/Manager

Ramer & Ramer
Judicial Judgment Recovery

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Counsel Barnhill;

I oppose any restrictions on the public's access to information held in bankruptcy filings. The current approach ofopenness is best. Our society benefits from public access to court records as transparency maintain the integrity of the system. Those who petition the bankruptcy courts for protection from creditors cannot possibly enjoy the same expectation of privacy in their financial affairs as those who honor their legal and financial responsibilities. Since the Department of Justice estimates that one-fourth of all bankruptcy cases include fraud committed by the debtors, perhaps the next study should focus on ways to discover and prevent this wave of white collar crime.

Regards,

Scott Ramer CMPI
Ramer&Ramer
Owner

UNITED STATES BANKRUPTCY COURT
Western District of Oklahoma
215 Dean A. McGee Avenue
Oklahoma City, Oklahoma 73102

Grant E. Price
Clerk

Telephone
405-231-5642

July 28, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW Suite 780
Washington, D.C. 20530

RF: Request for Comments on Privacy Protection in Bankruptcy Cases

Please accept the enclosed proof copy of a law review article I have written as my answers to the questions in the study on privacy and bankruptcy by the Department of Justice. The article is to be published in the summer 2000 issue of the Notre Dame Journal of Law, Ethics and Public Policy.

While the entire article is pertinent to the study on privacy in bankruptcy, different parts of the article address the questions raised in the study. Questions 1 - 3 are addressed in Parts I, II, & III of the article. Question 4 is addressed in Part II & IV of the article. Questions 5 & 6 are addressed in Part II of the article. Finally, Question 7 is addressed in Part IV of the article. Part IV, pages 1064 - 1083, contains the majority of comments and suggestions on access to bankruptcy information, The article addresses concerns with access to social security numbers, other personally identifiable information and all private information submitted in bankruptcy cases. If the article is not an acceptable form of answer to the questions, please let me know.

If it would be helpful to have more copies, I would be happy to send more. The issue of the law review is in final editing and reprints should be available in the next two to four weeks. Should the study commission have any questions or request clarification of any points, please contact me at the address above, or at the following numbers:

405-23 1-5652
405-23 l-5866 (fax)
Mary_Jo_Obee@okwb.uscourts.gov

Sincerely,

Mary Jo Obee
Chief Deputy Clerk

PRIVACY IN THE FEDERAL BANKRUPTCY COURTS*

MARY JO OBEE**
& WILLIAM C. PLOUFFE, JR.***

INTRODUCTION

Since January, 1995, the Bankruptcy Court for the Western District of Oklahoma has been offering remote access to full electronic case files, dockets, claims registers and all documents. Technical discussions on design and implementation of the system were rigorous and involved many groups with interest in the bankruptcy system. Part of the discussion with each group concerned the extent and manner of access to the documents. Top ics included the extent of information to be included in searchable debtor and creditor indexes and whether the information should be available on the Internet or through a more limited access dial-in system. The major issue of discussion concerned whether access to case files and pleadings should mirror today's accessibility to paper records as closely as possible or whether access levels should be changed to maximize use of the capabilities of today's technology. Because of the level of concern raised, we chose to provide only limited, dial-in access. The level of controversy over this topic has increased greatly

* The authors wish to extend their sincere thanks to the following individuals for their comments and suggestions: Professor Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School, Hon. Richard L. Bohanon of the U.S. Bankruptcy Court for the Western District of Oklahoma, Hon. Terrence L Michael of the U.S. Bankruptcy Court for the Northern District of Oklahoma, Hon. Dana L Rasure of the U.S. Bankruptcy Court for the Northern District of Oklahoma, and Hon. Bernice B. Donald of the U.S. District Court for the Western District of Tennessee formerly of the U.S. Bankruptcy Court for the Western District of Tennessee.

** B.S., University of Arizona, 1978; J.D., magna cum laude, Oklahoma City University, 1991. Ms. Obee is currently serving as the Chief Deputy Clerk of the U.S. Bankruptcy Court for the Western District of Oklahoma. She formerly served as Law Clerk for the Hon. Richard L. Bohanon of the U.S. Bankruptcy Court for the Western District of Oklahoma.

*** BA, summa cum laude, North Adams State College, 1981; B.S., summa cum laude, Worcester State College, 1982: M.A., University of Massachusetts, 1993; J.D., with honors, University of Tulsa, 1996. Mr. Plouffe is currently serving as Law Clerk for the Hon. Bernice B. Donald of the U.S. District Court for the Western District of Tennessee. He formerly served as Law Clerk for the Hon. Richard L. Bohanon of the U.S. Bankruptcy Court for the Western District of Oklahoma.

since that time as other courts have begun providing access to electronic case records over the Internet. The specific issues being discussed in the bankruptcy community regarding access are not unique and have been ongoing for several decades in the private and public sectors and in other countries. Access to medical, tax, marketing, credit, banking, Social Security and driver's license records have all been the subject of discussion. Controversy over the breadth of information now collected by entities, including the courts, is only a portion of the debate. The majority of the concern with collection of personal information of the types listed above arises not from provision of the information in any one place, such as records collection in bankruptcy court, or for any one purpose, but from the proliferation of databases, called data warehouses, ease of access to those databases and the ability to combine information from several places using data mining to make a detailed profile of an individual."

Currently, access to bankruptcy records is limited absent electronic records. Reviewing information on a debtor requires a visit to the courthouse or obtaining copies of pleadings through a lengthy process of exchanging correspondence with the clerk's office. One can access information through a name search on a specific debtor or by having knowledge of a specific case number. Requesting information about random, unknown parties or requesting wholesale review of all cases is time and cost prohibitive. Therefore, people' do nof seek information randomly or on a wholesale basis, but only come into contact with the 'records of those known, specific individuals they are inter-ted, in. Easily searchable information on creditors or attorneys does not exist at all. These circumstances have provided a "practical obscurity" to the sensitive, personally. identifiable information present in all bankruptcy cases.[2]

The competing access interests of those involved in bankruptcy cases have lain dormant until the prospect of altering the level of access to the information from this current practice became possible. The first concern regarding access brought to our attention involved the privacy interests of all parties identi-

1. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, MAKING GOVERNMENT WORK: ELECTRONIC DELIVERY OF FEDERAL SERVICES 144 (1993): FEDERAL TRADE COMMISSION, REPORT TO CONGRESS ON INDIVIDUAL REFERENCE SERVICES (1997); Presidential Directive on Privacy of Personal Information, Privacy and Personal Information in Federal Records, May 14, 1998, *available* in 1998 WL 241263; Glenn R. Simpson, *E-Commerce Firms Start to Rethink Opposition to Privacy Regulation as Abuses, Anger Rises*, WALL ST. J., Jan. 6, 2000, at A24.

2. U.S. Dep't of Justice v. Repotters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

fied in cases, including debtors, creditors and their respective attorneys. All of these groups wished that we provide as little public access to information specifically about them as necessary for the proper administration of a case and no more. While espousing an interest in protecting information pertaining to themselves, creditors and attorneys also expressed an interest in being provided unlimited access to information involving other creditors, attorneys and debtors. Finally, a third interest group, consisting of third parties not involved directly in any particular case, desired unlimited, wholesale access to information to evaluate the operation of the judiciary and effectiveness of the bankruptcy law, for collecting financial information for subsequent sale or to use for purposes other than the administration of a bankruptcy case. This group included news media, academia and commercial entities such as brokers, credit reporting companies, real estate title and abstract companies and lenders.

Answering the many questions concerning whether access to bankruptcy records should be altered from current practice, and if so how, requires looking at these issues within the context of the increase in information collected and disseminated across our global society, We are cognizant that any analysis must be aware of the larger issues of access in coming to terms with pub lic access to court data. In most other context+, the public, commentators and legislators have been asking that the reasons for collecting information and for providing access to it be reviewed first because " [t] he. mere fact that .a record has been public historically does not justify continued treatment without first examining the reasons behind the original policy."[3]

To begin the analysis, it is useful to identify the information' being discussed and then look at the reasons why people are arguing over access to it. The discussion should then continue by, identifying the interests of individual privacy and public access which are being espoused in general. These interests can then be explored by reviewing the history of access and privacy in court proceedings and records, and applying the concepts in the general debates on access to records in the federal courts. Finally, we will try to find a solution or solutions to the question of whether, and if so how, to alter access to bankruptcy information.

3. Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185, 1213 (1992).

I. THE NATURE OF PERSONAL INFORMATION, COLLECTION AND DISSEMINATION

It is difficult to read any legal publication, or magazine and newspaper of general interest, and not find an article concerning the use of new technology to collect and disseminate personal information.[4] The discourse is almost a frenzy. Most of the general interest literature details some horror story of lives hurt or ruined due to use of information about a person which was freely available to others without the person's knowledge.[5]

Commentators define personal information as any information which is linked or related to an individual through a commonly used, yet unique identifier.[6] Records kept on individuals and entities which are linked by such an identifier are numerous and contain an amazing array of information concerning financial activity, criminal records, health records, employment information, geographic information, physical characteristics as well as one's beliefs and behavior.[7] These records have been collected for many decades and often outlive their subjects.

---

4. See, *e.g.*, Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Cmn-: Why Self Regulation is Inadequate*, 49 S.C. L. REV. 847 (1998); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998); T. 'Christopher McLaughlin et al., *Financial Institutions Fraud*, 35 AM. CRIM. L. *REV. 789* (1998); Martha Brannigan, *Quintiles Seeks Mother Lode in Health "Data Mining"*, WALL ST. J.. Mar. 2, 1,999, at B4; Andrea Petersen & Matthew Rose, *Data+ of a Merged AOL Brings Cheers and Chills*, WALL ST. J. Jan. 14, 2000, at B6; Glenn R. Simpson, *Intuit Acts to Curb Leaks on Web Site*, WALL ST. J., Mar. 2, 2000, at A3.

5. *See* Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1159 (1997) (fraudulent use of Social Security Number caused five years of credit problems, theft of wallet resulting in identity theft and false arrest for murder and robbery, typographic error in data entry for credit bureau caused almost entire town to experience credit problems); Jon G, Auerbach et al., *Prying Eyes: With These Operators, Your Bank Account is Now an Open Book*, WALL ST. J., Nov. 5, 1998; Peter Lewis, *License Database Compromised: Online Paper Posted Wrong Access Codes on Web Site*, SEATTLE TIMES, Sept 4, 1998, at B1; Peter Maas, *How Confidential am Your Personal Affairs*, PARADE MAGAZINE, Apr. 19, 1998; Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997; Thomas E. Ricks, *This Stealth Offense Turns Military Brass into sitting Ducks*, WALL ST. J., Dec. 8, 1999, at Al (detailing fraud obtaining credit cards in names of military officers whose names and social security numbers were placed on the Internet after being obtained through the Congressional Record); Credit *Card Numbers are Stolen by Hacker, Then Posted on Web*, WALL ST. J., Jan. 11, 2000, at B10.

6. See George Trubow, *The Development and Status of "Information Privacy" Law and Policy in the United States*, in INVITED PAPERS ON PRIVACY: LAW, ETHICS AND TECHNOLOGY (1981).

7. Regarding public sector record keeping, see Heyward C. Hosch, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 140 n.5 (1983). For private sector record keeping, see

While such a broadly defined list of records sounds innocuous and collection of this information has been relatively unchallenged in the past, the quantity and detail of information which can now be compiled on an individual from just a handful of record keepers is astounding. Information collected can easily give a profile of an individual including the following: name, personal photograph, age, sex, address, social security number, telephone number, names and information on family members, size and types of rooms in your home, satellite images of your neighborhood and street maps to your home, employment information, income, names of creditors, outstanding debts, arrests and convictions, tax liens, lawsuits referencing your name, books and publications read, hotels and casinos visited, medical products purchased, foods purchased at grocery stores, whether you hunt or fish and whether you are an officer of a business.[8]

The entities collecting this information are almost too numerous to list. It is safe to assume that anyone you come into contact with, except other individuals, is keeping records. Every type of government entity, whether local, municipal, state or federal, keeps computerized records. These entities maintain hundreds, probably thousands, of computerized databases on individuals. Recorders of deeds and liens, taxing authorities, schools and colleges, keepers of drivers license and voting records, various 'welfare -and benefit providing agencies, law enforcement agencies, the 'postal service, libraries and the courts all keep records on individuals. Private entities keeping computerized records include: credit bureaus, banks, mortgage companies, stock brokers, news media, insurance companies, the Medical Information Bureau, hospitals, doctors and pharmacies, employers, churches, dubs, manufacturers, grocery stores, departments stores and list and information brokers.

We provide some information voluntarily when we fill out a form for a government entity, a warranty survey card, an applica-

---

Elizabeth deGrazia Blumenfeld, *Privacy Please: Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps In?*, 54 Bus. LAW. 349 (1999). *See also* David J. Klein, *Keeping Business Out of the Bedroom: Protecting Personal Privacy Interests from the Retail World*, 15 J. MARSHALL J. COMPUTER & INFO. L. 391 (1997).

8. See DAVID F. LINOWES, PRIVACY IN AMERICA, IS YOUR PRIVATE LEE IN THE PUBLIC EYE? (1989); Sandra Byrd Petersen. Your *Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, *48* FED. COMM. L.J. 163 (1995); David Bank, *Know Your Customer*, WALL ST. J., June 21, 1999, at R18 (detailing techniques and uses of profiling); Blumenfeld, *supra* note 7, at 353; Gindin, *supra* note 5. Robert Gellman, *Who is Using IT the Most to Invade Our* Privacy?, GOV'T COMPUTER NEWS, Sept. *13, 1999; Secret Service Financed* License *Photo* Database, DAILY OKLAHOMAN, Feb. 19, 1999; Charles J. Sykes, Your Best *Defense Against Big Brother: You*, WALL ST. J., Jan. 24, 2000, at A27.

tion for credit or when we answer a survey. In most instances, however, information is obtained without our knowledge or consent. A great deal of information is collected whenever a purchase is made using a grocery store shopping card, credit card, debit card or a check. Even borrowing a book from the library results in a record.[9] Insurance companies receive information through interviews with neighbors and co-workers and in some instances through surveillance, Collection of information upon access to the Internet, through identification tag on computing chips and through "cookies," is a new source of acquiring information. Finally, information is acquired by third parties from the original collectors. Many government agencies receive information from private entities complying with statutory reporting requirements.[10] In the private sector, most information is acquired by third parties through sales from the original collectors, including stores, financial institutions, credit card companies and government agencies.[11]

Government uses of personally identifiable information fall in four main areas: law enforcement, tax collection, benefit program payment and tracking and various regulatory applications and enforcement Various federal, state and local law enforcement entities are performing increasing data warehousing and data mining of multiple data bases to perform criminal activity monitoring and criminal profiling and tracking.[12]

The list of uses of such information in the private -sector.+ long: 3

—Solicitation of contributions for charitable or political organizations;
-Location of persons and assets for debt collections;
-Product and service market r&arch and sales;
-Medical research;
--Sociological and economic research,
-Determination of employment eligibility;
-Determination of housing eligibility;
-Dispensing medical, legal and other professional advise.

The largest uses in the private sector involve credit and sales. Entities use the information they collect or purchase to determine buying preferences for direct mail marketing and to evalu-

9. See A. Michael Froomkin, Rood *Control* on *the Information* Ocean: *Living with Anonymity, Digital Cash,* and *Distributed Databases,* 15 J.L. & COM. 395, 486 (1996).
10. See *id,*
11. *See id.*
12. See id. at 489.

ate an extension of credit. The second largest use of information again relates to commerce, generally debt collection, by list and information brokers to private investigators, lawyers and insurance companies.

While most of these uses are arguably to the benefit of society and individuals, harmful and illegal uses of this information are becoming more common. Identity theft and stalking are two areas where the ease of access to detailed personal information has hurt a growing number of people. Identity theft allows the perpetrator to steal from creditors often harming the lives of their innocent victims in addition to the theft from the creditor.[13] Some identity thieves commit more violent crimes including burglary and murder virtually anonymously under the identity of another.[14] Further, stalkers have murdered victims using detailed information on their residences and habits found by compiling information from easily accessed information sources such as drivers license databases.

Prior to changes in technology and society contemporaneous with the Civil War, individuals were anonymous except to those they knew personally. Few records were kept and one functioned in a society where decisions and activities were based on personal observations.[15] In the late 1800s and early 1900s, population grew and people moved to cities. Transactions and activities were based less on personal observations and. relationships and more on recorded information which was available- only to the recorder.[16] In spite of the amount of information collected, this 'practical obscurity" gave the appearance of privacy protected.[17] Over 'the last' thirty years, technology, and the ever more intense collection of personal information, has caused one's life to become an open book. Until the last fifteen years, gathering all of the information cited earlier in one compilation was prohibitive in cost and time unless the person concerned was a public figure. Some of the information discussed, such as purchases at a grocery store, was not available in any record.

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13. *See supra* note 5. See *also* Sandra T. M. Chong, Data *Privacy:* The *Use* of *Prisoners for Processing Personal Information,* 32 U.C. DAVIS L. REV. 201 (1998); Kristen S. Provenza, *Identity Theft: Prevention and Liability,* 8 N.C. BANKING INST. 319 (1999); Maria Ramirez-Palafox, Identity *Theft on the Rise: Will the Real John Doe Please Step Forward?,* 29 MCGEORGE L. REV. 483 (1998); Margaret Mannix, *Getting serious About Identity Theft,* U.S. NEWS & WORLD REP., *Nov.* 8, 1999, at 88.

14. *See supra* note 13.

15. *See* PERSONAL PRIVACY STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION AGE 1-2 (1977).

16. *See* id at 2.

17. U.S. Dep't of Justice v. Repotter's *Comm.* for Freedom of the Press, 489 U.S. 749, 780 (1989).

While one may object to the acquisition and use of information, it is clear that some information must be collected and used for the activities of our society to function.[18] The problem, in essence, involves the interplay between the functioning of a person within society and everyone's need to withdraw from society at times and in different ways.[19] The objections by commentators, legislators and the public on electronic access to information are twofold. First, they are concerned about the proliferation of unknown and unauthorized use of the information in ways unrelated to the purpose for which it was first collected.[20] They are asking also that the original collectors of the information provide support for what is collected, in particular, they object to the collection of too much information, that which is inappropriate and irrelevant for the activity or transaction it is collected for.[21]

The proliferation of these invasions on electronic information are keyed to a relationship which identifies all information as belonging to a specific individual. In the United States, the unique, universal identifier is the social security number. Indeed, in the report of the Senate committee marking up the Privacy Act of 1974, the use of social security numbers was cited as "one of the most serious manifestations of privacy concerns in the nation." In the twenty-five years following that report, the problems of linking personal information. together using social security numbers has only worsened.

It is this link, along with technology, which has brought the issue to the fore.[22] While in the past, the information on what groceries one bought, the progression of residences one lived in and one's financial history did not seem sensitive it does appear

18. *See* PAUL M. SCHWARTZ & JOEL R REIDENBERG, DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION 37 (1996); W. Ware, *A Taxonomy for Privacy*, in NVITED PAPERS. ON PRIVACY: LAW, ETHICS AND TECHNOLOGY 27 (1981)).

19. *See* SCHWARTZ & REIDENBERG, *supra* note 18, at 37-39.

20. See FEDERAL TRADE COMM'N., STAFF REPORT ON THE PUBLIC WORKSHOP ON CONSUMER PRIVACY IN THE GLOBAL INFORMATION INFRASTRUCTURE (1996); BOARD OF GOVERNORS, FED. RESERVE SYSTEM, REPORT TO CONGRESS CONCERNING THE AVAILABILITY OF CONSUMER IDENTIFYING INFORMATION AND FINANCIAL FRAUD (1997); MARY J. CULNAN, PRIVACY AND THE TOP 100 WEB SITES: A REPORT TO THE FEDERAL TRADE COMMISSION (1999); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1998).

21. *See supra* note 20.

22. *See* Thomas B. Kearns, Technology and *the Right to Privacy: The Convergence Of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. *975 (1999)*; Leslie A. Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN L.J. 151 (1998).

from the great amount of commentary that the public always considered this information *sensitive. The news* articles and various surveys and studies have the theme that individuals thought this sensitive information was protected, they want it to continue to be protected and something should be done to protect it again.

The public is being heard through the media on the issue of what comprises sensitive information. Reviewing these articles indicates that any financial or medical information is considered sensitive. Federal and state areas of legislation also provide insight as to what information has been considered sensitive.[23] Two long standing pieces of legislation, the Freedom of Information Act and the Internal Revenue Code, provide protections for sensitive information collected by public agencies linked to specific individuals.[24]

The public has only recently begun to voice a concerted disapproval of use and access to information linked to social security numbers.[25] Social security numbers are collected and referenced almost daily for every person in this country and related to some activity or commercial transaction.[26] This relation of a product or service purchased, bank transaction, medical visit or government record to a social security number later allows the detailed profiles referenced earlier to be compiled. Even the charitable act of donating blood generates a record

23. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: *1997* OVERVIEW (1997); CRIMINAL HISTORY RECORD INFORMATION: COMPENDIUM OF *STATE* PRIVACY AND SECURITY LEGISLATION (1992): George Trubow, *The Development and Status of "Information Privacy" Law and Policy in the United States, in* INVITED PAPERS ON PRIVACY: LAW, ETHICS AND TECHNOLOGY (1981). *See also* Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318, 112 Stat 3007 (codified in scattered sections of 18 and 28 U.S.C.); Financial Information Privacy Act of 1999, S. 187, 106th Cong. (1999).

24. See Flavio L. Komuves, *We've Got* Your Number: An *Overview* of *Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers, 16* J. MARSHALL J. COMPUTER & INFO. L. 529,15153 n.146 (1998). In response to the recent publication of concerns about confidentiality, the Driver's Privacy Protection Act was enacted. See 18 U.S.C. §§ 2721-2725 (1994 & Supp. N 1998). The Act is very controversial, but seeks to protect personal information with links to any specific individual. *See* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998). Specifically, photographs, social security numbers, license plate numbers, name, address, phone number. and medical and disability information is protected from disclosure. Any information on driving records or information related to the operation of the state agency is not protected.

25. See Komuves, *supra* note 24.

26. See id. at 536-49.

relating a person's name and any diseases to a social security number.[27]

This is the context in which the debate over collection and disclosure of information in bankruptcy records is set. The information collected at- the bankruptcy court includes almost every type of information being discussed in the media, in legislation discussed earlier and information which has been deemed sensitive in other contexts for many years by federal and state legislation.

Bankruptcy records add to the detail of the information collected from the other sources mentioned previously, and provide an increased ability to corroborate information held in these other databases for profiling purposes. The bankruptcy petition requires a debtor to list in detail all assets and the whereabouts of each asset. This list includes the name, address and account numbers for all types of bank, credit union and brokerage house assets. It also requires a detailed list of all debts owed, to whom owed, the amount and the consideration for the debt Further information is required on current and past lifestyle circumstances, including residences and employment for the three years previous to filing bankruptcy. A cash flow statement is required detailing all current sources of income as well as a comprehensive listing of expenses, thus providing a very revealing picture of a person's lifestyle both piior to and upon filing. All of this information is related to an individual or entity through their--social security or. tax identification number, which is required to be provided on the petition. -In some jurisdictions, the social security or tax identification number of the debtor is required by local rule to be present on any document filed with the court.[28] Clearly, the bankruptcy process is a very intrusive gatherer and disseminator of personal information and is part of the debates on public access to such information.

II. NATURE OF PRIVATE AND PUBLIC INTERESTS IN INFORMATION ABOUT INDIVIDUALS

The individual interest in privacy is called upon to protect various types of activities a person engages in as well as for various types of property owned by an individual. Generally, there are three aspects to privacy: 1) privacy from physical intrusion by others, 2) privacy with regard to one's own actions, and 3) infor-

27. *See* id. at 538.

28. *See* N.D.N.Y. L.R. 9004-Z; D. Colo. L.B.R 105; S.D. Iowa Bankr. R 5; D. *Ran.* L.B.R 1005.2; D.S. D. L.B.R 90042.

mational privacy.[29] The first aspect, privacy from physical intrusion by others, is, at least theoretically, protected by the Fourth Amendment for intrusions by the government[30] and by statutory provisions, to include prohibitions against trespass, and by tort law for intrusions by private parties.

The second aspect is protected by, inter alia, a number of U.S. Supreme Court decisions which had their genesis with the decision of *Griswold v. Connecticut*.[31] These include: the right to choose a marriage partner,[32] the right to use contraceptives,[33] the right to watch obscene movies,[34] the right to have an abortion,[35] the right to choose who lives in a house,[36] and the right to engage in sexual relations (but not homosexual relations).[37]

This right has also been held to include the right to educate one's children.[38] However, this right was established well before Griswold.

The third aspect, informational privacy, is more problematic and the focus of this article. It is generally defined as a limitation upon the ability of another to gain, disseminate, or use information about oneself.[39] In the context we are examining, it can be stated broadly as a notion or idea of privacy in personal information and identity.

The extent and history of the contemporary concept of privacy or confidentiality in various types of information about individuals extends back over 100 years.: Definitions of the interests expounded are amorphous. The first express reference to a right to personal or domestic privacy came from Judge Cooley and was quoted by Justice Brandeis in his seminal article on the

29. *See* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY 60 (1997); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L REV. 737, 740 (1989).

30. *See* Katz v. United States, 389 U.S. 347 (1967) (holding that a violation of the Fourth Amendment does not involve a question of a physical trespass, but involves a reasonable expectation of privacy).

31. 381 U.S. 479 (1965).

32. *See* Loving V. Virginia, 388 U.S. 1 (1967).

33. See Eisenstadt v. Baird, 405 U.S. 438 (1972); *see also* Carey v. Population Servs. Int'l, 431 U.S. 78 (1977).

34. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

35. *See* Roe v. Wade, 410 U.S. 113 (1973).

36. *See* Moore V. City of East Clweland, 431 U.S. 494 (1977).

37. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Griswold v. Connecdcut, 381 U.S. 479 (1965).

38. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

39. *See* ABA, REPORT ON THE NATIONAL SYMPOSIUM ON PERSONAL PRIVACY AND INFORMATION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES 5 (1981); Rubenfeld, *supra* note 29, at 740.

subject.[40] Since that time, the debate over this subject has grown, rising in the last thirty years to its current level concomitantly with changes in technology.[41]

Although 100 years old, Justice Brandeis's writings as regards the concept of privacy are still cogent:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right *to be let alone." . . . The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.[42]

Since Justice Brandeis's time, however, technology has only increased its assault on privacy.

Numerous arguments have been advanced as justifications for the right of privacy. Three of the basic philosophical arguments for a right of privacy are: 1) it is necessary for intimacy and social relationships, 2) it is necessary for personhood, and 3) it is necessary for liberty.

The intimacy and social relationship position, generally, takes a psychological, as opposed to political,. approach to the right:of privacy. This position holds that without privacy, there can be no intimate or social relationships.[43] Although philosophically and psychologically appealing, this argument provides little in the way of support for a legal argument of the existence of a right of informational privacy.

The argument that privacy is necessary for the existence of human beings as "persons" appears to provide little more in sup port. This argument states that privacy is an essential element

40. See THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS 29 (1878); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

41. *See* PRIVACY PROTECTION S-mm COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977); SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYS., U.S. DEP'T OF HEALTH, EDUC & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973); *Federal* Data Banks, *Computers* and *the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm.* on the *Judiciary*, 92d Cong. (1971); *The Computer and Invasion of Privacy: Hearings Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 89th Cong. (1966).

42. Warren & Brandeis, *supra* note 40, at 195, 213.

43. *See* Robert S. Gerstein, Intimacy and *Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY 265 (Ferdinand David Schoeman ed., 1984); James Rachels, Why *Privacy is Important*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra*, at 290.

for a human being to develop a sense of self and become and remain a person, in the developmental sense of the word." Of course, the definition of "person" is difficult to grasp but is most rationally interpreted in accordance with the philosophy of Immanuel Kant, that a person is an end unto himself.&

Closely related to this argument is the claim that privacy is an essential element of human dignity. It is privacy which permits human beings to be an individual.[46] As such, human dignity provides the link between becoming and remaining an individual person (i.e., personhood) and the political and legal concept of liberty, which is the final argument presented in support of the existence of a right of informational privacy.

This last position, that privacy is necessary for liberty, provides the greatest degree of support for a legal argument of the existence of a right of informational privacy. The essence of this position is that privacy promotes liberty. Indeed, individual privacy is required for freedom, else tyranny would result.[47] Privacy encourages learning and free inquiry which is the essence of Immanuel Kant's personal autonomy so essential to the value of a human being as a person, in the highest sense of the word. The lack of privacy invites critical examination which lessens respect for others. Privacy, in essence, promotes liberty.[48] And it is liberty and individuality which are the fundamental political and legal values of the Constitution and the Bill of Rights.,

' Thus, any analysis Of a right of informational privacy must be considered' to -have significant philosophical value as a liberty inter&t, which is the fundamental premise of the Constitution and the Bill of Rights. However, at least one author is of the opinion that fundamental rights carry a much greater value than just a liberty claim in any legal analysis, as demonstrated by the application of the 'strict scrutiny" test.[49]

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44. *See* Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 300.

4 5 . See I - KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas K. Abbott trans., 1954) (1785).

46. *See* Edward J. Bloustein, *Privacy as an Aspect Of Human Dignity, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note *43,* at 156. *See also* ALAN F. WESTIN, PRIVACY AND FREEDOM 32-39 (1967).

47. *See* LINOWES, *supra* note 8, at 179 (noting that in any totalitarian state, the first right to disappear is the right of privacy).

48. See Stanley Benn, *Privacy, Freedom and Respect for Persons, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 223; Ruth Gavison. *Privacy and the Limits of Law,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 346. *See also* WESTIN, *supra* note 46. at 23-26, 32-39.

49. See DECEW, *supra* note 29, at 80.

Commentators; defining the universal concerns of the individual in privacy, have identified four privacy interests specific to individuals supplying information on their personal affairs, all related to the benefit to the individual derived from releasing the information. These are, relevancy of information collected, accuracy of information as entered originally and subsequently maintained by the record-keeper, necessity of the original, restricted uses for the information, and limitations on subsequent disclosure to third parties.[50]

The interests of the public relative to the activities, property and information about individuals is reflected in the interests of a democratic government. These interests are composed of two competing elements, First, society as a whole has an interest in privacy of the individual.[51] When our society is no longer governed by individuals, but by a homogenous mass, democracy ceases to exist.[52] A more philosophical expression of this idea is eloquently stated by Mahatma Gandhi, "If the individual ceases to count, what is left of society?""[53]

Second, the nature of democratic government by the people requires that there be few limits on access to public records.[54] The reasoning behind this requirement is stated well by the founders of this country. The governed must police the state to stop fraud, waste and oppression.[55]

Although this philosophy underlies the formation of this country, there, are few express requirements for government record keeping and publication of information in the Constitution.. As regards the courts, the requirements 'for open records; and proceedings in criminal, prosecutions is found under the Constitution, in bankruptcy matters under statute and in civil cases under the common law. This interest has been discussed for all types of proceedings as a need for the public to assure proceedings are conducted Early, and that perjury, misconduct and decisions based on secret bias are discouraged.[56]

Further, society needs information to function; therefore, any action which chills the willingness of persons to provide information hurts society. In addition to chilling effects on col-

50. *See* Horsch, *supra* note 7, at 141 n.11; Trubow, *supra* note 6.
51. See LINOWES, *supra* note 8, at 12-14.
52. *See* Rubenfeld, *supra* note 29, at 805.
53. LINOWES, *supra* note 8, at 14.
54. *See* Cynthia L. Estlund, *Speech on Matters Of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30-32 (1990).
55. *See id.*
56. See Press Enter. Co. V. Superior Court of California, 464 U.S. 501 (1984); Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 571 (1980).

lection, the point can be made that when personal information becomes easy to misuse and inaccurate, then eventually there will come a point when no one can rely on the information given and functions of society will be hampered. For example, if a lender cannot rely on the information provided to it from an applicant and outside sources, due to identity theft or inaccuracies in data maintenance, it will incur too great a risk in lending and will curtail lending.

A. *Protection* of Individual *Interests*

This portion of the paper discusses privacy and protections of the individual, the next portion discusses the interests and protection of those on the other side of the debate. The collection of statutes, common law and claimed constitutional protections for various types of activities, property and rights in one's body, person and information are thin. The extension of specific legal sources of protection to personal information collected by public sector and private sector records keepers is tenuous or riddled with loopholes and exemptions. This hodgepodge of laws reflects the unsettled nature of the debate as to the bounds of privacy in personal information.

For this section, "private interests" will be defined to mean those interests which belong to or can be claimed by a private individual. Although artificial entities, such as corporations, can be construed to be "private," their unique status as creatures of statute with, inter alia, limited protections, indicates they should not be considered here.

Further, 'in addition' to the federal provisions, there are numerous protections at the state level; As this article concerns the federal bankruptcy courts -and the state protections are varied and numerous, these state protections will not be addressed.

1. Constitutional

The Fourth Amendment, which prohibits unreasonable searches and seizures, is considered to be the foundation for privacy protections. Although it was, initially, considered to only apply to physical intrusions,[57] in *Katz*, the Supreme Court expanded its scope to include interests where there is a "reasonable expectation of privacy."[58] This decision laid the groundwork for the recognition of the right of informational privacy.

57. *See* Olmstead v. United States, 277 U.S. 436 (1928).
58. Katz v. United States, 389 U.S. 347, 360-61 (1967).

Since *Katz*, the Supreme Court, in *Whalen v. Roe*,[59] explicitly recognized the threat to privacy by the accumulation of large amounts of data and, thereby, implicitly recognized the right to informational privacy. However, the right must be balanced by competing interests.[60] In Whalen, the Supreme Court recognized a legitimate interest of the state in collecting certain data.

It must be mentioned that the Fourth Amendment is not the only constitutional source of the right to privacy. In *Griswold*, the Supreme Court acknowledged the Ninth Amendment and the penumbra of the Bill of Rights as constitutional authority to acknowledge the right of privacy.[61] However, constitutional protections of privacy only apply against the government and not against individuals.

Defining the scope of constitutional privacy rights is a difficult task. There is no doubt that fundamental privacy includes such issues as contraception, child rearing and education, family relationships, and who to marry. However, the Supreme Court has recognized that the outer limits of the constitutional right to privacy have not been defined.[62]

2. Common Law

The common law tort of invasion of privacy provides protection against violations of privacy where the Constitution does not. Four separate torts are recognized: 1) placing a person in a false public light, 2) intrusion into a person's solitude, 3) public disclosure of private facts, and 4) appropriation of a person's name or likeness.[63]

These four torts do not adequately address the concerns of informational privacy. The tort of false light requires that the information be false and be made public. The tort of intrusion is usually applied to actual intrusions and must be offensive to the

59. 429 U.S. 589 (1977) (holding, however, that the Fourteenth Amendment does not protect the right of privacy).

60. For example, in *Cox Broadcasting Corp. v. Cohn*, *420* U.S. 469 (1975), the Supreme Court held that the constitutional right of free press outweighed the statutory and common law right to privacy where the name of a rape victim had already been announced in a public court proceeding. In an even more interesting case, the Court of Appeals for the Sixth Circuit held that even if documents are prohibited from disclosure by the Freedom of Informaiton Act, if they are entered into court records, the court is not required to place them under seal. *See Brown & Williamson Tobacco Corp. v. FTC*, *710* F.2d 1165 (6th Cir. 1983).

61. See Griswold v. Connecticut, 381 U.S. 479 (1965).

62. See Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1976).

63. See Restatement (Second) of Torts §652A (1977); William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960).

reasonable person. The tort of public disclosure required disclosure to the public at large and not just a few people. The tort of appropriation is usually applied in the context of advertising.[64] Each of these torts do not address the problem of informational privacy which includes the additional concerns of obtaining, maintaining, and privately communicating personal information. However, one author recognizes that these four torts do, at least, provide the basis for causes of action for violation of information privacy.[65]

3. Statutory

Statutes provide, perhaps, the most powerful tool for the protection of private interests, depending, of course, on the scope of wording.

a. *Fair Credit Reporting Act*[66]

This Act restricts private entities in the credit reporting industry to releasing information only to those entities it reasonably believes have a legitimate business need for the information (i.e., such as evaluation of credit worthiness, employment, insurance, etc.); However, the term 'legitimate business need" has been characterized by at least one author as a "broad loop hole."[67] Thus, although the law purports to protect private interests, it is, in practice, almost-meaningless.

b. *Privacy Act of 1974*[68]

This Act restricts the federal government's actions with regard to the information it collects. The government cannot release a written record without written consent unless certain circumstances exist. These circumstances include "routine use," law enforcement purposes, and protection of the health and safety of an individual: However, the provisions of this Act do not restrict private individuals.

This Act was amended by the Computer Matching and Privacy Protection Act of 1988.[69] This amendment allows government agencies, within certain written guidelines, to compare computerized records to establish or verify eligibility for benefits or to recoup payments on benefits. It also allows comparison for

64. *See* Petersen, *supra* note 8.
65. See Gindin, *supra* note 5.
66. 15 U.S.C. §§ 1681-1681t (1998).
67. Petersen, *supra* note 8, at 181.
68. 5 U.S.C. § 552(a) (1994).
69. 5 U.S.C. § 552(a) (1994).

personnel and payroll purposes. However, law enforcement, tax collection, and foreign counter-intelligence purposes are not covered by the amendment

c. *The* Family *Educational Rights and Privacy Act of 1974*[70]

This Act limits access to the educational records of students.

d. *The Right to Financial Privacy Act of 1978*[71]

This Act restricts the government's access to financial information held by an institution concerning a private individual without the person's consent or a valid warrant, subpoena, or summons. Further, any such release of information must be for law enforcement purposes and the person must be notified of the release.

e. *The Computer Fraud* and *Abuse Act of 1986*[72]

This Act provides for the protection of financial records at financial institutions. Entities who have suffered economic damage may initiate a cause of action under this statute. The mere release of a virus into the Internet will constitute a violation under this law.[73]

f. *Electronic Communications Privacy Act of 1986*[74]

This Act amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968. It protects against the unauthorized access, interception, or disclosure of private electronic communications by the government or private persons. The government is required to obtain a warrant before doing so. However, there are exceptions. One is that the communications service may disclose information to a law enforcement agency if the communication appears to involve a crime. Another is for communications which are readily accessible to the public (i.e., the Internet). And another is for interception and disclosure in the ordinary course of business, which courts have ruled include the monitoring of employees.[75]

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70. 20 U.S.C. §§ 1221, 1232(g) (1998).

71. 12 U.S.C. §§ 3401-3422 (1994).

72. 18 U.S.C. § 1030 (1994).

73. See United States v. Morris, 928 F.2d 504 (2d Cir. 1991).

74. Pub. L. No. 99-508, 100 Stat. 1848 (1994) (codified as amended in scattered sections of 18 U.S.C.).

75. See, e.g., Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412 (11th Cir. 1986).

g. Video Privacy Protection Act of 1988'"

This Act restricts the release of information concerning the videos that an individual rents. A similar provision applies to the release of information concerning the viewing habits of subscribers to cable television."

h. Driver's Privacy Protection Act of 1994[78]

This Act limits the release of information held by state departments of motor vehicles. This statute, however, has two loopholes: one for private investigators and another when drivers are given clear and conspicuous notice of possible disclosures on application and renewal forms.

i. Internal Revenue Code[79]

The I.R.S. is limited in releasing information gathered and maintained for tax purposes. Generally, tax returns and associated information are confidential. There are a number of exceptions which include release of information to: 1) state tax authorities, 2) Congress, 3) the President, 4) law enforcement agencies, and. 5) courts.

j. The Freedom of Information Act

Under the Freedom of Information Act, there are a number of recognized exceptions to the access of government information. Two of these exceptions encompass the release of information which would constitute an unwarranted invasion of personal privacy. These two exceptions focus on personnel, medical, and law enforcement records;" In these situations, the courts will balance the interests of revelation with the interests of privacy.*'

k. Social Security Numbers

Much discussion has been generated over the need to keep social security numbers private. The Ninth Circuit has indicated that there is a right to informational privacy, although this decision has not resulted in widespread judicial recognition.[82] **Although this decision could be used as a basis for not revealing**

76. 18 U.S.C. §§ 2710-2711 (1994).
77. See Cable Communications Policy Act, 47 U.S.C. § 551 (1994).
78. 18 U.S.C. §§ 2721-2725 (1994).
79. 26 U.S.C. § 6103 (1998).
80. *See* 5 U.S.C. § 552(b)(6) & (7) (1994).
81. See Hoch v. C.I.A., 593 F. Supp. 675 (D. D.C. 1983).
82. *See* Davis v. Bucher, 853 F.2d 718, 719 (9th Cir. 1988); *but see In re* Crawford, 194 F.3d 954 (9th Cir. 1999), cert. denied, 120 S.Ct. 1244 (2000).

the social security number in bankruptcy proceedings, a number of bankruptcy courts do not follow this reasoning.[83]

Although Section 7 of the Privacy Act restricts the use of the social security number by the government, there are so many exceptions to the mandate, that the restriction is essentially useless."[84] Although the law allows a person to refuse to divulge the social security number, where such divulgence is not mandatory, with no loss of benefits; this provision does not apply in the bankruptcy courts as divulgence is considered mandatory.[85]

In light of these proscriptions, one must ask whether it is appropriate (or legal) for the executive branch to be held to standards of privacy which are not applicable to the judicial branch? Although it may very well be statutorily legal for the bankruptcy courts to disclose certain sensitive personal information (i.e., social security numbers[86]), does such disclosure meet the demands of public policy? Does revealing the social security number in a "plain vanilla" bankruptcy case further any significant or compelling public interests or does doing so actually violate other, more vital, interests-such as informational privacy? For reasons of consistency, it would seem that the social security numbers should not be revealed, unless other overriding factors are present (i.e., the social security number is an element of the crime to be proven).

l. Other Statutes

The issue of individual privacy is clearly paramount in today's society. This is especially true of informational privacy. Numerous bills have been presented in Congress in recent years to protect informational privacy?

83. *See* In *re* Anderson, 159 B.R. 830, 838-39 (Bankr. N.D. Ill. 1993).

84. *See* Komuves, *supra* note 24, at 569.

85. *See* 11 U.S.C. § 342(c) (1994). See *also* FED. R BANKR. P. 1005; In *re* Anderson, at 838-39.

86. A number of courts have held that bankruptcy petition preparers do not have a fundamental right to refuse to disclose their social security numbers in the face of 11 U.S.C. § 110(c) (1994), which requires that they do so. *See* In *re* Adams, 214 B.R. 212 (B.A.P. 9th Cir. 1997): *In re* Rausch. 213 B.R 364 (D. Nev. 1997). Sue also In *re* Adair, 212 B.R. 171 (Bankr. N.D. Ga. 1997) (holding that the Privacy Act is not grounds for a debtor to refuse to disclose his social security number in violation of FED. R. BANKR. P. 1005). Indeed, the *Rausch* court noted that several other courts have held that there is no fundamental privacy right to refuse to disclose a social security number. *See Rausch*, 213 B.R. at 367 (citing McElrath v. Califano, 615 F.2d 424, 441 (7th Cir. 1980); Doyle V. Wilson, 529 F. Supp. 1343, 1348 (D. Del. 1982).

87. *See* Gindin, *supra* note 5, at 1217-18.

B. *Protections of Public Interests*

As stated previously, two groups claim interest in information about individuals. We have just visited the claims of the individual to privacy in his or her personal information. We now visit the claimed "need to know" of the public in that same information.

It is difficult to define "public interest." As a general matter, public interest has been defined as something in which the community at large has an interest or something which affects the rights or liabilities of the public. It does not include those things which are the object of mere curiosity or things which only involve particular localities. Matters of public interest include the affairs of local, state, and national governments.[88]

The question remains, then, who defines the public interest in personal information? In practice, the legislature,[89] the executive,[90] and the courts[91] all have the authority, to differing degrees depending upon circumstances, to define what is in the public interest. However, when the courts decide what is in the public interest, they usually employ a balancing test Moreover, any test of what is in the public interest is a flexible standard.[92]

The primary statutory expression of the public interest of. access to government information is the Freedom of Information, Act.[93] Its purpose is, generally, that the records of government agencies are open to public. inspection. The philosophical basis of this statute is that for a democracy to flourish and for the people to trust government, there must be open access to the activities of government.[94]

However, there are several statutory exceptions to access to information in government records. These include: 1) national security and foreign affairs, 2) internal agency personnel procedures, 3) information specifically excluded by statute, 4) trade

88. *See* Russell v. Wheeler, 439 P.2d 43, 46 (Colo. 1968); Burgum v. North Dakota Hosp. Serv. Ass'n, 106 N.W.2d 545, 547 (N.D. 1960); Glenn County Attorney v. Crockett County Assessor, 220 P. 816, 817 (Okla. 1922).

89. See, e.g., Pan Am. Airways v. United States, 371 U.S. 296, 308 (1963).

90. *See*, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 311 n.14 (1949).

91. See, *e.g.*, International Union, United Auto., Aerospace & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield, 382 U.S. 205, 221 (1965).

92. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

93. 5 U.S.C. $552 (1994).

94. *See* Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 545 (1993) (quoting Thomas Jefferson and James Madison).

secrets and commercial or financial information, 5) inter or inn-a-agency memos which would only be available to other agencies involved in litigation against that agency, 6) personnel and medical files where revealing them would constitute a clearly unwarrante'd invasion of personal privacy, 7) law enforcement records where revelation would interfere with enforcement proceedings, deprive a person of the right to a fair trial, constitute a clearly unwarranted invasion of personal privacy, reasonably to be expected to reveal a confidential source, reveal law enforcement techniques or procedures, or place a person in physical danger, 8) information -related to the regulation or supervision of financial institutions, and 9) geological and geophysical information.[95] These exceptions provide statutory protection for the enumerated public interests.

The Freedom of Information Act, however, does not apply to the courts because the courts are not considered an 'agency" for the purposes of the Act.[96] But this does not mean that the Freedom of Information Act is useless concerning the issue examined in this article. Even though it does not apply to the courts as a matter of law, it can be a guide for establishing policy. As a matter of public policy, the United States Supreme Court would likely recognize and indeed has already recognized some of these exceptions as applying to court records to prevent the release of sensitive information.[97]

The Freedom of Information Act expressly recognizes the significant public policy interest in open government records, which, in a free society, is essential.[98] However, the Act also expressly recognized, in its exemptions, that" personal privacy is an individual private interest which can trump the public -interest.- In such a situ&ion; it would seem likely that the enumerated public interests would take precedence over individual privacy interests, although there are notable exceptions such as rape shield statutes.[100]

Another protection as a balancing interest in the consideration of public interests is government efficiency. In the context

95. See 5 U.S.C. § 552(b) (1994).

96. *See* 5 U.S.C. § 551(1)(B) (1994). *See also* In *re* Adair, 212 B.R. 171, 173 (Bankr. N.D. Ga. 1997).

97. Consider, for example, the judiciary's well known refusals to release the identities of confidential informants and the courts' refusal to divulge national security information.

98. See Department of the Air Force v. Rose, 425 U.S. 352, 360-61 (1975); EPA v. Mink, 410 U.S. 73, 79-80 (1973).

99. *See* 5 U.S.C. § 522(b) (6) & (7) (1994).

100. See, e.g., MICH. COMP. LAWS ANN. § 750.520j (West 1999).

of the First Amendment, government efficiency has been recognized as a factor to be considered."' Considering that the Fist Amendment concerns the dissemination of information, these authorities could be analogized to the public nature of judicial records. Additional support for this argument of government efficiency is found in the bankruptcy statutes which mandate the disclosure of the social security number.[102] Thus, it could be argued that there is a general public interest in everyone having a national identifying number, thus, providing some support for the use of social security numbers in public documents such as bankruptcy petitions as a means to notify potential creditors and to properly and accurately identify the debtor."' Thus, the efficiency argument is closely related to the purposes espoused in the bankruptcy statutes-proper notification of creditors of the accurate identity of the debtor.

Another interesting protection of the public interest is the Computer Fraud and Abuse Act.[104] This statute appears to have some indirect conflict with the purpose of the Freedom of Information Act and the judicial policy of open records. Where the Freedom of Information Act is based on the policy of open records, the Computer Fraud and Abuse Act criminalizes the mere unauthorized access of a government computer.[105] Thus, information that belongs in the public domain and which, is accessed in a government computer without authorization is a criminal act. Iii this sense, it appears that greater emphasis is being placed upon government authority and procedure than,

101. *See,* e.g., Waters v. Churchill, 511 U.S. 661, 675 (1994); Board of Educ. of Kiryas Joel Wllage Sch. Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Conner, J., concurring in part and concurring in judgment); Bunker, *supra* note 94, at 554 (discussing the balancing of the right to access government information with the public interest of government efficiency).

102. At least one bankruptcy court has acknowledged that the Freedom of Information Act is not proper grounds for requesting that the social security number not be released. *See In re* Adair, 212 B.R 171 (Bankr. N.D. Ga. 1997).

Further, despite all the recent public concern expressed over the privacy issues associated with disclosure of social security numbers, at least one court has held that there is no fundamental right to privacy in a social security number. See *In re* Bausch, 213 B.R. 364, 367 (D. Nev. 1997); Komuves, *supra* note 24 (discussing the use of the SSN as a national identifier as gaining more and more acceptance both by government agencies and private entities).

103. *See* 11 U.S.C. § 342(c) (1994). *See also* FED, R. BANKR. P. 1005; *In re* Anderson, 159 B-R 830, 838-39 (Bankr. N.D. Ill. 1993).

104. 18 U.S.C. § 1030 (1994).

105. *See* United States v. Sablan, 92 F.3d 865, S68 (9th Cir. 1996).

upon the policy of open records.[106] Thus, as almost all governments records are now computerized, it would seem that there are public interest protections for all records, depending upon the mode of access and whether access is authorized.

In sum, there are numerous protections for public interests. The difficult aspect for any tribunal will be deciding whether the claimed public interest is, in fact, a public interest such that it should override a private interest.

III. AVAILABILITY OF INFORMATION FROM THE FEDERAL COURTS: CURRENT LAW AND REASONING

So far, our discussion has identified a growing problem in society as a whole with the extent of information collection and the intrusive use and misuse of that information. Concomittantly with the increase in information dissemination, there has been an increase in the debate between the interests of individuals and the interests of the public in that information. In this context, lies the growing debate regarding access to the information presented to and filed with the courts. Most precedent in this area is found at the state level and by the federal courts of appeals.[107] Generally, rights to access judicial processes are differentiated based on whether access is sought to a proceeding, trial or hearing before a judge, or. to judicial records, the various papers and other forms of information generated and collected through court procedures. Controversies concerning information are divided between the rights to access the information and the rights to use or disseminate the information.

Most of the access controversies to come before the courts have involved criminal matters. In criminal cases, depending upon the type Of proceeding, access and use are afforded and protected through the First Amendment and the common law.[108] In bankruptcy cases, access and use are afforded and pro-

106. One author notes that this could result in the prosecution of innocent users. *See* Haeji Hong, *Hacking Through the Computer Fraud and Abuse Act*, 31 U.C. DAVIS L. REV. 283 (1997).

107. *See* Louis F. Hubener, *Rights of Privacy in Open Courts—Do They Exist?*, 2 EMERGING ISSUES ST. CONST. L. 189, 191-93 (1989); Arthur R. Miller, *Confidentiality, Protective Orders, and* Public Access *to the Courts*, 105 HARV. L. REV. 427, 427 n.7, 432-40 (1991). Also, the Freedom of Information Act does not apply to the judicial branch. See Brown & Williamson Tobacco Corp. V. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983).

108. For recitation of the history of common law rights regarding access to judicial proceedings and records, see Richmond Newspapers, Inc. V. Virginia, *448* U.S. *555, 565-74 (1980); Gannett Co., Inc. v. DePasquale, 443* U.S. 368, 387-91 (1979); Nixon V. Warner Commmunications, Inc., 435 U.S. 589, 597 n. 8 (1978).

tected through statute, rules of procedure and the common law. As regards civil cases, access rights have been mainly found to depend upon the common law.

If the level of controversy on a subject reflects the level of public interest, few people were interested in accessing the great majority of court records and proceedings until the 1970s. At that time, jurisprudence concerning access to court information increased by orders of magnitude over the previous 100 years. Until the middle 1970s, there were very few published opinions as regards access to court records and proceedings and just as few references to such access in statutes and rules.[109] Government misuses of secret information, concomitant with the technical explosion in the ability to record and reference information, apparently caused an explosion in the desire, and time available, to seek out information such as that residing in the courts.[110] At the same time, the courts changed their civil rules of procedure allowing more discovery and exchange of information between the parties in a case, thus creating more information which parties would seek access to.[111] Procedures, rules and processes which the courts had evolved over the years for filing and accessing information came under attack in the quest for ever more information."[112] During this time, the Supreme Court heard an astounding nine cases involving access to court records or pro-

109. *See* Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Sheppard v. Maxwell, 384 U.S. 333 (1966); *In re* Oliver, 333 U.S. 257 (1948); Craig v. Harney, 331 U.S. 367 (1947); *In re* Mosher, 248 F.2d 956 (C.C.P.A. 1957); *In re* Sackett, 136 F.2d 248. (C.C.P.A. 1943); *In re* Drawbaught, 2 App. D.C. 404 (1894); Brewer v. Watson, 71 Ala. 299 (1892); Colescott v. King, 57 N.E. 535 (Ind. 1900); Sanford v. Boston Herald-Traveler Corp., 61 N.E.2d 5 (Mass. 1945); Cowley v. Pulsifer, 137 Mass. 392 (1894); Nowack v. Fuller, 219 N.W. 749 (Mich. 192%): Schmedding v. May, 48 N.W. 201 (Mich. 1891); Park v. Detroit Free Press, 40 N.W. 731 (Mich. 1888); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); Flexmir, Inc. v. Herman, 40 A.2d 799 (N.J. Ch. 1945); Munser v. Blabdell, 48 N.Y.S.2d 355 (1944); Allen v. Lackey, 188 P.2d 215 (Okla. 1947); *In re* Caswell, 29 A 259 (RI. 1893); Youmans v. Owens, 137 N.W.2d 470 (Wis. 1965); King v. King, 168 P. 740 (Wyo. 1917).

110. *See* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment fight of Access Opens a New Round,* 29 U. RICH. L. REV. 237 (1995).

111. *See* Miller, *supra* note 108, at 447-63.

112. *See* id The attack on state statutes is especially noteworthy. For long-standing development of procedures and test of release or sealing of information, see id (detailing the evolution of the discovery process to provide more equal access to justice and an increase in efficiency in case management with procedures to protect privacy). Included in these rules are recent changes mandating disclosure of certain information in civil cases for the reasons of expense and delay reductions, similarly to the requirements currently in bankruptcy cases. *See* Lloyd Doggett & Michael Mucchetci, *Public Access to Public* Courts: Discouraging *Secrecy* in the *Public Interest, 69* TEX. L. REV. 643 (1991).

ceedings.[113] While the number of cases heard on this single area is large, the specific issues spoken to were fairly narrow, concerning almost exclusively criminal matters.

We will present the current law on availability of court records derived from these cases as applied to criminal matters and the derivation from the law regarding criminal cases by the lower courts of availability of information in civil matters. Then, we will discuss the current availability in bankruptcy matters. The history of access to the first two areas is of much longer standing and provides an interesting context for understanding current access levels to bankruptcy information.

A. *Criminal Prosecutions*

Outside of discovery, grand jury proceedings, plea negotiations, jury deliberations and presentence investigative matters a public right of access to all aspects of criminal prosecutions has been found. The right to access criminal case proceedings and to disseminate information from those proceedings is afforded expansive and strong protection from the First Amendment. The right of access to judicial records in criminal cases, including exhibits admitted at trial, and to disseminate information from the records, is generally afforded less protection at the common law.

Information gathered in criminal cases takes myriad forms, including physical samples, furniture, documents, recordings as well as formalized documents such as warrants, indictments, information, motions, responses, orders and judgments. The evidentiary discovery materials are not in the physical possession of the court until admitted at trial. The nature of most of the evidence and content of documents is extremely private, revealing family relationships, sexual information, medical information and financial information.

The proceedings held in criminal cases are numerous. Starting with the meetings of the grand jury, these include hearings on issuance of warrants, probable cause to try, evidentiary suppression hearings, juror voir dire, motions in limine and sentenc-

113. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Waller v. Georgia, 467 U.S. 39 (1984); Seattle Times v. Rhinehart, 467 U.S. 20 (1984); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982): Richmond *Newspapers*, 448 U.S. at 555; *Gannett* Co., 443 U.S. 368; *Warner* Communications, 435 U.S. at 589; Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

ing related hearings. A record of any proceedings held before a judge or magistrate is required."[114]

The law of access to criminal case information developed most rapidly with the trial. The seminal case regarding access to criminal trials, *Richmond Newspapers*, found both a common law and First Amendment right that criminal trials be open and accessible to the public.[115] Further refinement of the expression of this right by the Supreme Court in the *Globe Newspaper case* specified that only a most stringent, strict scrutiny test would overcome the First Amendment right.[116] These discussions were extended in the Press *Enterprise* cases to include open access to the voir dire of jurors in criminal cases and open access to probable cause preliminary hearings in criminal cases.[117]

The reasoning given for access to criminal proceedings rests upon two bases. These bases are set forth in the opinion and various concurrences in *Richmond Newspapers*. The reasoning of the divided court in Richmond *Newspapers* has been restated in subsequent opinions by the Court and has *been* much analyzed by commentators. In the plurality opinion and several concurrences, the justices found that criminal trials had historically been an open institution in American government.[118] As a second basis for finding a First Amendment right to open criminal trials, the justices found, particularly Justice Brennan in his concurrence in judgment, an unstated but structurally necessary component of the Constitution. to informed suffrage and participation in government. The justices found a First Amendment tight to access' government information and processes to the extent necessary to both evaluate government 'operations, a type of informed suffrage, and to contribute to the process or operation itself, where public access brings independent contributions to the operation.[119] The Court: found the elements of historical practice, informed suffrage and an independent contribution to the criminal trial from the presence of the public in the courtroom to be present in its determination that the right of access

114. *See* 28 U.S.C. § 753(b) (1994).

115. *See Richmond Newspapers*, *443* U.S. at 555.

116. *See Globe Newspaper* Co., 457 US. at 607-08.

117. *See Press-Enterprise I*, 464 U.S. at 501; *Press-Enterprise II*, 478 U.S. at 1.

118. See *Richmond Newspapers*, *448* U.S. at 567-73.

119. See *id* at 575-80 (speaking to effects of publicity on witnesses and prosecutors as well as analogies to system of checks and balances); Gannett Co., Inc., v. DePasquale, 443 U.S. 421 (Blackmun, J., concurring and dissenting) ("It is not surprising, therefore, that both Hale and Blackstone, in identifying the function of publicity at common law, discussed the open-trial requirement not in terms of individual liberties but in terms of the effectivenes of the trial process."); Cerrutti, *supra* note 110.

extended to criminal trials as civic exercises or government operations.[120]

These aspects of the First Amendment right were further clarified in *Globe Newspaper*.[121] After refining the right, the Court found, in the context of a mandatory closure statute, that the denial of access to a criminal trial must be necessitated by a compelling governmental interest and narrowly tailored to serve that interest.[122] The findings in this opinion, as well as those following, seem to point to the validity of a case by case determination of the necessity of closure for privacy, fair trial or other constitutional grounds.[123] Lower courts, using mostly the second portion of the analyses *of Richmond* and the strict scrutiny of Globe have extended the First Amendment right to access criminal trials to other aspects of criminal cases.[124]

The right to disseminate information heard or seen at a criminal trial appears clear. The Supreme Court has consistently found a First Amendment right to disseminate even sensitive information if it was disclosed at a criminal trial or other criminal proceeding.[125] The right to have physical access to exhibits or copies of exhibits admitted at **criminal trials or proceedings** is less clear.[126] The Court in *Nixon*, found that any right to access **exhibits and other judicial records is found, if present at all, under the -common law and no First Amendment right to access this -type of -information exists.**[127]

120. *See Richmond Newspapers*, 448 U.S. at 594-96 (Brennan, J., concurring) (finding action of judge at trial to bc a form of lawmaking).

121. *See Globe Newspaper Co.*, 457 U.S. at 604-06.

122. *See id.* at 607-08.

125. *See id.* at 608 ("Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest").

124. *See* id.

125. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989); Oklahoma Publ'g Co. v. U.S. Dist. Court, 430 U.S. 308 (1977); Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Cox Broad. Corp. V. Cohn, 420 U.S. 469, 492, 496 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1965); Estes v. Texas, 381 U.S. 523 (1965); Craig V. Harney, 331 U.S. 367, 374 (1947).

126. *See* Niion v. Warner Communications, Inc., 435 U.S. 589 (1978); United States v. Kaczynski, 154 F.3d 930 (9th Cir. 1998); United States v. McDougal, 103 F.3d 651 (8th Cir. 1996); *In re* CBS, Inc., 828 F.2d 958 (2d Cir. 1987); United States v. Guzzino, 766 F.2d 302 (7th Cir. 1985); Belo Broad. Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); In *re* National Broad. Co., 653 F.2d 609 (D.C. Cir. 1981); United States v. Criden, 648 F.2d 814 (3d Cir. 1981); In *re* National Broad. Co., 635 F.2d 945 (2d Cir. 1980);

127. *See* Nixon, 435 U.S. at 608-09. *See also* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 120 S.Ct. 483 (1999). For a civil case holding no First Amendment right to access government records, see Calder v. Internal Revenue Serv., 890 F.2d 781, 78384 (5th Cir. 1989) (citing Houchins v. KQED,

Rights to access court records in criminal matters are about as clear as that to access exhibits at trial. The Supreme Court has not visited this specific area. The various courts of appeal are very divided over the source of rights to access judicial records in criminal cases. Some circuits find a First Amendment right to access criminal records and others find only a common law right.[128]

Of all judicial proceedings, criminal cases are truly unique. While the defendant is a private citizen, the public is always the prosecutor. Violation of the criminal law affects the continuance of society and thus places the public as a victim/party in the suit with their champion, the prosecutor. Indeed, criminal matters are so important to the function of our society and government that they may only be brought by a government entity, through its agent. The case also may only be heard by a judge, a government functionary. Where in a civil matter, the parties may negotiate among themselves or use outside private parties to mediate or arbitrate their dispute, no private party may bring or hear a criminal case. Indeed, vigilante justice against supposed criminals is itself a crime.

B. *Civil Suits*

The extent and protection of rights -in information 'from civil matters is more ill-defined than that for criminal matters. Most of the precedent in this area comes from the courts of appeal as only one issue regarding access and dissemination rights in civil matters has reached the Supreme Court. The rationale of the courts varies widely. Notwithstanding these differences, rights to access civil case proceedings and records, and

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Inc., 438 U.S. 1. 14 (1978)) ("There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . .The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."). *See also* Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Gr. 1986).

128. See United States v. Corbitt, 879 F.2d 224 (7th Cir. 1989); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989): In *re* Search Warrant for Secretarial Area, 855 F.2d 569 (8th Cir. 1988); *In re New* York Times Co., 828 F.2d 110 (2d Cir. 1987); In *re* Washington Post Co.. 807 F.2d 383 (4th Cir. 1986); United Stares v. Smith, 776 F.2d 1104 (3d Cir. 1985); United States v. Peters, 754 F.2d 753 (7th Cir. 1985); United States v. Santarelli, 729 F.2d 1388 (11th Cir. 1984); Associated Press, Inc. V. United States District Court, 705 F.2d 1143 (9th Cir. 1983); United States v. Burka, 289 A.2d 376 (D.C. Ct. App. 1972).

to disseminate information accessed, appear to be based upon the common law, except in the Third Circuit.[129]

The physical information and proceedings to which the public seeks access, and the parties' privacy, include information gathered by the parties, some of which is brought to the court and some not, and information generated by the court The information brought before the court is determined by rules of procedure promulgated by the judiciary and local judges. These rules are organized along three broad areas: pretrial documents and proceedings, trial procedures and documents and post-trial documents and proceedings.

Pretrial rules allow the parties to gather a great deal of information. The general types of materials and records generated through these rules and statutes primarily consist of what are known as discovery materials. Discovery materials include copies of original documents of the litigants, written answers to questions and stipulations of fact, as well as transcripts of depositions, face to face question sessions. The more formalized documents which may be filed at this stage also include motions, applications, responses, answers, the complaint and answer, objections, notices and orders. Federal civil rules detail the format, and to some extent the content, of the complaint and any answer or responsive motion.[130] The rules require the names of the litigants be, revealed. by placing them on the complaint and subsequent pleadings.[131]

The majority of hearings held at this stage. concern disputes over exchange of discovery information. Many hearings&e also held concerning various motions to proceed without a trial, such as motions to dismiss and for summary judgment.

At the trial, information gathering has stopped and the presentation of relevant and admissible portions of that information takes place. The results of all that has transpired through pretrial proceedings are presented to the judge and jury. Transcripts and recordings along with any physical evidence are gathered as the records of the trial.

Post-trial information gathered includes motions, responses, objections, notices and orders along with appellate briefs. The types, format and some content of subsequent documents

129. *See* Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991); Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

130. *See* FED. R CIV. P. 3 & 5.

131. *See* FED. R CIV. P. 10(a) & 7(b)(2).

through post-trial actions are also set forth.[132] The format of these documents is dictated by rules of procedure.

In addition to mandating the type and format of information presented to the court, requirements for court generated records are also set forth in rules of procedure. A docket and the chronologic index of all documents and hearings, must be kept.[133] A separate chronologic index of judgments must be kept by the court.[134] Orders, notices and judgments generated by the court must also be filed and conform with format requirements in the rules of procedure. Physical evidence presented at trial must be kept with the court, usually for a limited time.[135]

Almost all of the information gathered during these three stages is filed with the court or presented at the trial. Settlement negotiations and related materials, juror names and deliberation transcripts or materials, and judges' notes are the few areas where filings of transcripts and materials are not required.[136] Finally, transcripts or electronic recordings must be kept of every hearing or trial.[137]

The law of access to this information is not as clear as most would like it to be. While a rule of procedure affords the public access to trials on the merits before a judge, no bright line tests of access rights to other proceedings and information have evolved and decisions rest on required case by case application of judicial case management rules.[138]

The analysis used by the majority of courts in civil cases to determine access rights to either judicial-records or proceedings hinges on the limited findings and language of the Supreme Court in two cases, *Nixon v. Warner Communications* and *Seattle Times v. Rhinehart*, both of which specifically involve judicial records.[139] A small minority of courts use the reasoning found in *Richmond Newspapers, Inc. v. Virginia in* analyzing civil case access, relying on dicta found. in a footnote in that case.[140]

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132. *See* FED. R. Crv. P. 5 & 10. *See* Fed. R. App. P. 27-32.

133. *See* FED. R. CIV. P. 79.

134. *See* FED. R. CIV. P. 58 & 79.

135. See FED. R. CIV. P. 83.

136. *See* United States v. Gurney, 558 F.2d 1202, 1210-1211 (5th Cir. 1977). However, settlement agreements and orders in class actions must be filed pursuant to FED. R. Crv. P. 26(e). See Miller, *supra* note 107, at 427.

137. 28 U.S.C. § 753(b).

138. *See* FED. R. Ctv. P. 77(b).

139. See Seattle Times v. Rhinehart, 467 U.S. 20 (1984); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

140. See Richmond Newspapers, Inc. V. Virginia, 448 U.S. 555, 580 n.17 (1980) ('Whether the public has a right to attend trials of civil cases is a ques-

what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process."[165]

Moreover, "[d]ocuments that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken"[166] are not relevant for evaluation of the judicial system and thus not subject to public access. These courts follow the reasoning of Justice Holmes:

> The chief advantage to the country which we can discern [from application of the public records privilege to judicial records] . . . is the security which publicity gives to the proper administration ofjustice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. . . . [I] t is clear that [these grounds] have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration ofjustice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court."[167]

Even after information is classified as a judicial record, and thus subject to some level of a public right of access, access may be limited through protective orders, sealing or redacting information, made upon a showing of good cause or an overriding interest Limiting access through a finding of good cause generally involves trade secrets, confidential business information or improper use.[168] Compelling, overriding interests have been found to include privacy,[169] a fair trial,[170] "safeguarding the phys-

1502, 130810 (7th Cir. 1984); Oklahoma Hosp. Ass'n v. Oklahoma Publ'g Co., 748 F.2d 1421 (10th Cir. 1984); *Joy*, 692 F.2d at 880.

165. *El-Sayegh*, 131 F.3d at 163.

166. *Id.* at 162 (citing Washington Legal Found. v. United States Sentencing Com'n, 89 F.3d 897, 905 (D.C. Cir. 1996)).

167. Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

168. *See* FED. R. CIV. P. 26 (c)(7).

169. *See In re* Knoxville News-Sentinel Co., Inc., 723 F.2d 470 (6th Cir. 1983); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983).

170. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

ical and psychological well-being of a minor,"[171] and protection of juveniles,[172] and national security. Most of the findings are very fact driven. Much has been written about the use and misuse of these tools of judicial case management and a complete discussion of the jurisprudence of these tools is beyond the scope of this article.[173]

As can be seen, the basis for access to criminal versus civil proceedings and records lie in the government nature of the case.[174] Criminal cases are essential government functions with the public involved in three ways: as a secondary victim; through its agent, the prosecutor; and its agent, the judge. Civil cases have fewer public/governmental components. They generally do not involve the government, thus the public, as a party. The functionaries subject to public scrutiny in a civil case are essentially the judges. Because of this low level of government presence in a civil trial, the courts concentrate scrutiny on the judge as the primary focus of the right of public access and have limited access to those proceedings where a judge is present making substantive findings, and to those materials which show how the judge is administering a case and upon which the judge relies to make those substantive findings.

C. *Proceedings* in *Bankruptcy*

The extent of rights in inform&on concerning bankruptcy courts is found in statutes and rules of procedure. There is little case law and most courts have not had, to rule on First Amendment or common law access rights issues.

171. *Id.* at 607 n.19.

172. *See* 18 U.S.C. § 5088(a), (c) & (e) (1994).

173. See Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL'Y 381 (1990); Lloyd et al., Public *Access to Public Courts: Discouraging Secrecy* in *the Public Interest*, 69 TEX. L. REV. 643 (1991); Miller, *supra* note 107.

174. "Arguably, the public interest in securing the integrity of the fact finding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former, but not the latter." *In re* Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983).

> For the purpose of civil litigation, courts exist chiefly as a public service to persons who cannot work out their private disputes and need the intervention of an unbiased entity to help bring the controversy to an end. Briefly stated, the public interest in civil litigation is mainly that these private disputes be concluded peacefully, fairly and without too much cost to society as a whole.

Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1017 (11th Cir. 1992) (Edmondson, J., dissenting).

The information and proceedings before a bankruptcy court to which the public seeks access are divided into three main areas, pursuant to various statutes and rules.[175] These areas are distinguished by the level ofjudicial involvement, the presence of adverse parties and the need for actual litigation process. The **first of these areas, "a case under title 11," for our purposes** the **"main bankruptcy case," consists primarily of uncontested applications and administrative procedures unique to the bankruptcy code, which mostly proceed by operation of law.[176] The second**

175. *See* 28 U.S.C. § 1334 (1994) (distinguishes four types of matters in bankruptcy and grants original jurisdiction to the district court over these matters):

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under tide 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jut-isdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The district court is allowed to refer any part, or all, of this grant of jurisdiction to bankruptcy judges, pursuant to 28 U.S.C. § 157(a) (1994), with reservation or limitations to jurisdiction further refined by exceptions to several types of civil suits, pursuant to 28 U.S.C. § 157(b) & (c) (1994):

> (b)(5) The district court shall order that personal injury tort and wrongful death claims shall he tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.
>
> (c)(l) A bankruptcy judge may hear a proceeding that is not a case under title 11 but is otherwise related to a case under title 11.

176. *See* 11 U.S.C. §§ 301-303, 501-503 & 521 (1994). "Section 1334 lists four types of matters over which the district court has jurisdiction: (1) 'cases under tide 11,' (2) 'proceedings arising under title 11,' (3) proceedings 'arising in' a case under tide 11, and (4) proceedings 'related to a case under tide 11.' The first category refers merely to the bankruptcy petition itself, filed pursuant to 11 U.S.C. §§ 301, 302 or 303." *In re* Wood, 825 F.2d 90, 92 (5th Cir. 1987). *See also In re* Wolverine Radio Co., 930 F.2d 1132, 1141 (6th Cir. 1991). According to the 1983 Advisory Committee Notes of the Federal Rules of Bankruptcy Procedure, applications are requests for relief requiring judicial consideration but not involving adverse parties; applications include requests for: permission to pay filing fee in installments (Rule 1006(b)(l)), appointment of a creditor's committee (Rule 2007(a)), employment of a professional person (Rule 2014(a)), entry of final decree (Rule 2015(a)(6)), compensation for services rendered (Rule 2016(a)), notice as to criminal contempt (Rule 9020(a) (2)), removal (Rule 9027(a)), and shortening periods of notice (Rule 9006(d)). See FED. R. BANKR. P. 9013 (advisory committee notes).

This portion of a case under tide 11, opening bankruptcy papers, applications and voluntarily filed forms, has been found to consist of a legal remedy which does not rise to a suit in law. Courts reason that this part of the proceedings is not a suit because no damages are sought, there is no opposing party

area consists of proceedings arising under title 11 called "contested matters" which are not civil suits, as that term has been defined by the courts, but involve adverse parties and the consideration of a judge.[177] The third area consists of "adversary proceedings" which are civil suits involving some area of bankruptcy, or nonbankruptcy, law.[178] The proceedings and materials held by the court *in* each area and, arguably, the levels of public access afforded to them, differ.

The information generated in the main bankruptcy case and contested matters includes documents required of the debtor, motions and claims filed by creditors, applications, orders releasing liens and abandoning some property, as well as court generated administrative notices and court generated orders discharging the debtor and closing the case. The content and types of documents generated are mandated by statutes and rules.[179] Official forms are provided for most of these documents.[180]

It is the main bankruptcy case which generates the information most at issue in this article. As discussed previously, the content of the forms filed in a bankruptcy case includes extensive, private, financial and demographic information concerning debtors. Information in a main bankruptcy case concerning

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against whom redress is sought, and compulsory process is not issued. *See* Zn *re* Barrett Ref. Corp., 221 B.R. '795 (Bankr. W.D. Okla. 1998); *In re* Psychiatric Hosps. of Fla., Inc., 216 B.R. 660 (Bankr. M.D. Fla. 1998); Texas v. Walker, 142 F.3d 818 (5th Cir. 1998).

177. *See* FED R. BANKR. P. 9014, 1018. *See also In re* Wolverine, 930 F.2d at 1144 (citing In *re* Wood, 825 F.2d at 96-97).

178. *See* FED. R. BANKR. P. 7001 (listing ten such proceedings). According to the 1983 Advisory Committee Notes, adversary proceedings are actual disputes involving adverse parties which involve litigation requiring process as in any civil suit. They include some disputes arising under title 11 and some disputes arising under nonbankruptcy law which are related to a case under title 11.

Courts find adversary proceedings to be civil suits. *See, e.g.*, In *re* Mitchell, 222 B.R. 877 (9th Cir. 1998); In *re* Doiel, 228 B.R. 439 (Bankr. D. S.D. 1998); *In re* Mueller, 211 B.R. 737.741 (Bankr. D. Mont 199'7); *In re* Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d 1140 (4th Cir. 1997).

179. *See* 11 U.S.C. § 301 (1994) (regarding the petition to he filed); 11 U.S.C. § 501 (1994) (listing of creditors and schedule of assets and liabilities, schedule of current income and expenditures and a statement of financial affairs); 11 U.S.C. § 521 (1994) (statement of intentions with respect to retention and surrender of secured property): 11 U.S.C. § 522(l) (1994) (list of prop erty claimed exempt from the estate); 11 U.S.C. §§ 1106 & 1107 (1994) (reports on assets and operations); 11 U.S.C. §§ 1121, 1221 & 1321 (1994) (filing a plan); FED. R. BANKR. P. 1002-1004; FED. R. BANKR P. 1005: FED. R. BANKR. P. *1007;* FED. R BANKR. P. 4002.

180. FED. R. BANKR. P. 9009 (requires use of official forms which are allowed pursuant to 28 U.S.C. § 2075).

creditors includes creditor name and address, and the nature and amount of the debt owed.

There is little historical information concerning the basis for inclusion of the various types of information required of the debtor in bankruptcy documents. Most of the information required is relevant to identification of debtors, location of assets and determination of debtors' financial condition. Courts have found the need for the information disclosed to aid creditors in identifying the debt owed and determining debtors' ability to pay, to identify estate assets and to identify possible bankruptcy fraud.[181]

The provision of social security numbers on the petition is of some controversy, Several courts have recited protection of creditors as the primary reason for requiring the numbers.[182] These courts find that social security numbers are necessary to protect creditor due process rights by helping the creditor identify the debtor, thus allowing them to identify the debt owed and file any necessary proofs of claim or take other actions, and by helping creditors and other entities in the bankruptcy system to identify serial filers, locate unlisted assets or find other instances of bankruptcy fraud.[183]

Adversary proceedings generate the same type of records as in any civil suit. Some of these records are composed of discovery materials as discussed previously for a civil suit

181. *See In re* Laws, 223 B.R. 714 (Bankr. D. Neb. 1998) (debtor sought to use alternate address; court found could only seal address when debtor is threatened by assault).

182. *See In re* Adair, 212 B.R. 171 (Bankr. N.D. Ga. 1997); *In re* Anderson, 159 B.R 830 (Bankr. N.D. Ill. 1993); In *re* Austin, 46 B.R 358 (Bankr. E.D. Wis. 1985).

183. Notwithstanding this reasoning, tbe Bankruptcy Code provides that the name, address and social security number/tax identification number of debtor if omitted from the Notice of Commencement of Case and First Meeting of Creditors does not invalidate the legal effect of that notice. *See* 11 U.S.C. § 342 (1994). See a&o 140 CONG. REC. H10752-01, H10759 (1994):

> This section amends section 342 of the Bankruptcy Code to require that notices to creditors set forth the debtor's name, address, and taxpayer identification (or social security) number. The failure of a notice to contain such information will not invalidate its legal effect, for example, such failure could not result in a debtor failing to obtain a discharge with respect to a panicular creditor.
>
> The Committee anticipates that the Official Bankruptcy Forms will be amended to provide that the information required by this section will become a part of the caption on every notice given in a bankruptcy case. As with other similar requirements, the court retains the authority to waive this requirement in compelling circumstances, such as those of a domestic violence victim who must conceal her residence for her own safety.

Most of the information genemted in a bankruptcy case or adversary proceedings is required to be filed with the court.[184] The court is required to keep a docket composed of chronologic entries of activity, orders and judgments.[185] A separate docket of creditor claims, the claims register, is also required of the court.[186] Copies of judgments and orders are also kept.[187] Finally, if a transcript or recording of a proceeding before a bankruptcy judge is made, it must be filed as well.[188]

The need for a place to file the information required for the various parts of a bankruptcy case, and a place for parties and the public to review the information, is self-evident. The reasoning for placing the courts as the repository for all information, except tapes of the meeting of creditors, appears to be based on happenstance, rather than on use of the information by the court. There was no other entity at the time the bankruptcy code was enacted to give the duty to.[189] The U.S. Trustee's Office was too new and experimental. No one knew if it would succeed, and it had no office space to store documents or space to offer public access to review the documents.

Proceedings before a bankruptcy judge in a main bankruptcy case are rare. The debtor is required to appear at least once at a meeting of creditors; however, this meeting is a mandated deposition and not a proceeding as courts have used that term in civil or criminal cases.[190] This meeting is presided over

184. *See supra* note 182.

185. FED. R. BANKR. P. 5003(a).

186. *See id.* 5003(b).

187. *See id.* 5003(c).

188. *See id.* 5007.

189. The 1977 Report of the Commission of' Bankruptcy Laws recommended that all petitions be filed with the yet to be created Office of the United States Trustee. The House version of the bill did not specify a place to file petitions. *See* H.R. REP. No. 595321 (1977). The Senate version specified filing petitions with the bankruptcy judge. The current provisions at 11 U.S.C. §§ 301-303 appear a practical compromise. See S. REP. No. 98451 (1978). In addition, the House and Senate reports indicate that, other than the opening documents related to the petition, ail other post-petition documents were to be filed with the court.

190. *See* 11 U.S.C. §§ 341-43 (1994). 11 U.S.C. § 341 (c) states that "[t]he court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors." Some of the reasoning behind this procedure is found in the House Report:

> In keeping with the thrust of the bill to remove the bankruptcy judge from administrative matters and not to involve him in situations where he will hear evidence outside of the context of a dispute that he must decide, the bankruptcy judge will not be the presiding officer at the meeting, and will not be authorized to question the debtor as he is today. If there were to be any disputes resolved there, the judge might

by an employee of the Office of the United States Trustee, part of the Department of Justice, or a case trustee, who is appointed by a United States Trustee, The trustee and creditors depose the debtor and a recording, which is kept at the local office of the U.S. Trustee, is made of the meeting.[191] Subsequent depositions and requests for documents of debtors, and some entities, are also allowed and procedures for compelling attendance and production are provided.[192] Involvement of a bankruptcy judge in these depositions is extremely rare.

If a dispute of a cause under the bankruptcy code, a contested matter, does arise, pleadings are filed with the court. Some of the discovery information acquired through examinations of the debtor and other entities may be presented to the court as exhibits to a motion. A hearing or trial may actually be held before a bankruptcy judge.

In adversary proceedings, the same type of proceedings are held before a bankruptcy judge, or in some instances a district judge, as in any civil suit[193] Most of the rules of procedure used in a civil suit before the district court apply also to an adversary proceeding in bankruptcy court, including especially the pretrial discovery rules.[194] Adversary proceedings receive a court case number separate from the court number given the main bankruptcy case.

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be present, but will not be present for the examination of the debtor, as this has caused too many problems of the dispute-decider hearing inadmissable evidence.

H.R. REP. No. 595-331 (1977).

191. *See* FED. R. BANKR. P. 2003(c) (Record of Meeting):

Any examination under oath at the meeting of creditors held pursuant to § 341 (a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the Unites States trustee shall certify and provide a copy or transcript of such record at the entity's expense.

192. *See* FED. R BANKR. P. 2004 (allowing examination of debtor arid entities with respect of acts, conduct, property, liabilities and the financial condition of the debtor); FED. R BANKR. P. 2005 (compelling attendance).

193. Pursuant to 28 U.S.C. § 157(a) (1994), jurisdiction to hear disputes and cases is referred to the bankruptcy judges by an order of district court. This reference may be withdrawn upon motion and order by the district court. *See* id $157 (d). The referral is withdrawn by operation of law for causes including personal injury torts, wrongful death suits and disputes involving matters of interstate commerce, pursuant to 28 U.S.C. § 157(b)(5) & (d).

194. See FED. R BANKR. P. 7002-7071.

The history of public access to the various types of processes and proceedings in bankruptcy is not well chronicled. However, the evolution of general bankruptcy principles and practices is, and may shed some light on why a proceeding may or may not need to, or have been, public.

The principles upon which bankruptcy is based have developed along with increases in trade and economic advances. Over the ages, debt has been abhorred and incurring debt has been considered a dishonest act, while becoming bankrupt has been considered a criminal act.[195] This belief in the criminal nature of failure to pay one's debts arose from practices in ancient societies and religious teachings against any form of usury.'" These laws began to be lifted in the late middle ages; however, bans on money lending were not fully removed by the Catholic Church until 1836 and still exist under Islam.[197] In light of the religious beliefs against usury, secular punishment and treatment of debtors have been harsh and parralled criminal punishment and prosecution procedures.[198]

The influence of this tradition is still present under both English and American laws today. However, beginning in 1898, and expanding in 1978, American bankruptcy law began to break with the old traditions of treating debtors as criminals'" and two

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195. *See* Charles Jordan Tabb, The *History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 8-12 (1995) (quoting Blackstone):

> "[T]he law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting, has debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fond, the dishonesty and injustice is the greater."

196. *See* JAMES D. DAVIDSON & LORD WILLIAM REES-MOGG, THE GREAT RECKONING 231-34 (1993) (portraying an interesting exposition on the confluence of religious practices and economics).

197. *See* Tabb, *supra* note 195. at 12 (quoting Blackstone):

> "A bankrupt. , .was formerly considered merely in the light of a criminal . . . . But at present the laws of bankruptcy are considered as law calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the debtor or bankruptcy himself"

See also DAVIDSON & REES-MOGG, *supra* note 192.

198. Punishments included imprisonment, death, appearance on demand and others. See Tabb, *supra* note 195, at 7-12.

199. *See* David A. Skeel, Jr., *The Genius of the 1898 Bankrupt? Act*, 15 BANKR. DEV. J. 321, 328 (1999) ("Unlike the almost punitive British system, the 1898 Act was repeatedly defended as protecting the 'honest but unfortunate' debtor."): Tabb, *supra* note 195, at 5.

factions developed.[200] The first is composed of those who focus on bankruptcy law as an avenue to punish criminals, who happen to be called debtors.[201] The second, reformist faction, allows for the existence of fraudulent, criminal debtors, but sees bankruptcy law as an avenue to return the majority of unfortunates, called debtors, to contributing members of society.[202]

There is no question that early American principles of bankruptcy law were derived from the English, old tradition system.[203] That system was first codified some 400 years ago, and began with allowance for only discretionary, quasi-criminal examinations of witnesses by the court, solely for the purpose of investigating suspected fraudulent debtors.[204] Contrary to the voluminous historical information concerning public access to criminal proceedings under early English law, historical information concerning access to bankruptcy proceedings is conspicuously absent and general historical information does not indicate whether any proceedings were open to the public. Information

200. These two factions still exist and are very active today. *See Responses of Honorable Edith H. Jones to Follow-up Questions of the Senate Judiciary Subcommittee on the National Bankruptcy Review Commission Report*, 52 CONSUMER FIN. L Q. REP. 169,171 (1998) (referring to abuses by debtors generally and the decline of the "moral stigma of bankruptcy").

201. *See* Tabb, *supra* note 195, at 8 ('The premise of debtor misconduct as the basis for involuntary bankruptcy, rather than financial status, remained in place until the Bankruptcy Reform Act of 1978 was enacted.").

202. *See* Charles Jordan Tabb, *A Century of Regress or Progress?: A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 355-57 (1999) (quoting H. H. Shelton, *Bankruptcy Law, its History and Purpose*, 44 AM. L. REV. -394, 401 (1910) and then the 1890, Report of the House Judiciary Committee):

> Countless debtors throughout our country were laboring under the burden of debt, and the debt-laden man has little ambition to accumulate, or to succeed as the world views success. His energies do not play freely, his family suffers, and he is not in position to render either the State or society efficient service. . . .
>
> It is a matter of public concern that every citizen should have an opportunity to pursue the calling for which he is best adapted and in the way and under the circumstances which will enable him to be as large a producer as possible, to the end that the aggregate wealth of the community in which he lives may be increased. When a man has paid his honest debts to the extent of the distribution of his property, it becomes a matter of public concern that he should be released from his indebtedness.

203. As Justice Holmes stated, 'We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system." Sexton v. Dreyfus, 219 U.S. 339, 344 (1911).

204. 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES 3 (2d ed. 1915).

on access to bankruptcy papers and pleadings is nonexistent. In more modern times, a second type of proceeding, a public examination of the debtor by the English court was instituted.[205] Under current practice, this examination may be conducted privately. [206] The examination, and subsequent investigations under the English system are akin to a combination full financial audit and criminal background check, taking several years to complete.[207]

As with the English system, historical information as regards access to American bankruptcy proceedings and materials is lacking. In its beginnings, the American system required an examination of the debtor by the court where only creditors and parties in interest could attend.[208] The Bankruptcy Act of 1898 altered this process by requiring a meeting of creditors to be held before a judge or referee, with judicial discretion as to any general public access.[209] Later amendments required that this meeting before the court be public.[210]

As discussed previously, bankruptcy practice in the last 100 to 150 years, under both English and American laws, has eliminated the presence of the court at the meeting of creditors and any nonadjudicatory examinations of the debtor or entities. In addition, these current laws contain provisions that allow waiver of public examination or provisions that do not expressly require that the meeting of creditors or examinations he held publicly at all.[211]

While these discovery type proceedings are not required to be open to the public under current American practice, rights of the general public and creditors to access hearings and-trials held before a bankruptcy judge are granted directly by a rule of

205. *See In re* Astri Inv. Manag. & Sec. Corp., 88 B.R. 730, 737 (D. Md. 1988) (citing several sources concerning English law of that time).

206. I. F. FLETCHER, LAW OF BANKRUPTCY (1978).

207. *See* Skeel, *supra* note 199, at 171 n.28 and references cited therein.

208. See Bankruptcy Act of 1841, §§ 4 & 7.5 Stat. 440, 444 & 446 (1841); Bankruptcy Act of 1800, §§ 18 & 52, 2 Stat. 19, 26 & 34 (1800)

209. Bankruptcy Act of 1898, §55, 30 Stat 544, 559 (1898).

210. Bankruptcy Act of 1938, 52 Stat. 840, 865 (1938). Courts of that time found that any proceeding before a judge or referee must not be held in *camera*. See *In re* Astri Inv., 88 B.R. at 738-39 and sources therein.

211. For the law of Great Britain, see Insolvency Act of 1976, ch. 60, §6 (1976); FLETCHER, *supra* note 206, at 112-15. For the laws of the United States, see 11 U.S.C. §§ 341- 343 (1994); FED. R BANKR. P. 2003-2004. While no mention or requirement of public examination at the first meeting of creditors is made in the American bankruptcy laws and rules, the recording or transcript of that meeting is required to made available for public access and copying by the United States trustee, *see* FED. R BANKR. P. 2003(c), and a report on the meeting is required to be filed with the court, see FED. R BANKR. P. 2003(d).

procedure.'"[212] This rule applies to both contested matters and any adversary proceedings because it refers to any trial or hearing before a bankruptcy judge and does not distinguish between the various types of proceedings which may be brought before a bankruptcy judge. Arguably, rights of public access to proceedings before a bankruptcy judge are also provided through the common law similarly as has been found by the majority of the courts of appeal to civil proceedings generally.

The issue of public access to bankruptcy proceedings has not drawn enough contention to result in many published opinions.[213] However, in this dearth of dispute, courts in one district have gone so far as to find that a bankruptcy case, and every event and proceedings associated with it, rises to the level of a civil suit and, therefore, the public is afforded a First Amendment right of access.[214] On that basis, they have found a First Amendment right of the public to attend the first meeting of creditors, the administrative proceeding held before an executive agency, the Department of Justice, and depositions in prelitigation discovery.[215] These courts' rather strained support greatly

212. FED. R BANKR. P. 5001(b) ("All trials and hearings shall be conducted in open court and so far as convenient in a regular court room.").

213. *See* In *re* 50-Off Stores, Inc., 213 B.R. 646 (Bankr. W.D. Tex. 1997) (in *camera* hearing on retention of professional allowed).

214. *See* In *re* Symington, III, 209 B.R. 678, 694 (Bankr. D. Md. 1997) (*2004* examination); *In re* Astri Inv., *88* B.R. at *736* (meeting of creditors).

215. Contrary to the majority of courts reviewing the issue *directly*, both courts find by result that the entity conducting the meeting or examination is an extension of the court. *See* In *re* Astri Inv., 88 B.R. at 740 ("However, the fact that a United States trustee now presides at creditor's meetings does not change the essentially judicial character of the proceedings."); *see also* Symington, 209 B.R. at 694 (finding that 2004 examinations include investigation of matters related to the substantive discharge rights of the debtor).

Though trustees and examiners are given broad authority under the Bankruptcy Code, and are judicial officers as that term is used to designate any attorney, the majority of courts find that they arc not extensions of the court as they do not adjudicate substantive rights of debtors and creditors. See *In re* Ionosphere Clubs, Inc., 156 B.R. 414 (S.D.N.Y. 1993); *In re* Lazar, 28 Fed. R Serv. 3d 52 (Bankr. C.D. Cal. 1993); *In re* Apex Oil Co., 101 B.R. 92, 99 (Bankr. E.D. MO. 1989); *In re* Baldwin United Corp., 46 B.R. 314, 316 (SD. Ohio 1985); *In re* Hamiel & Sons, Inc., 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982). *But see In re* Continental Airlines, 150 B.R. 334, 342 (D. Del. 1993) (finding fee examiner to be equivalent to a special master).

In addition, the legislative history of the current provisions of the Bankruptcy Code removing judges from presiding at examinations of the debtor also supports the argument that any trustee and examiners are not extensions of the court since they are, by negative implication, not a "disputedecider":

> In keeping with the thrust of the bill to remove the bankruptcy judge from administrative matters and not to involve him in situations where he will hear evidence outside of the context of a dispute that he must

exceeds the public access rights found in any civil context and even exceeds the level of access rights granted the public in the criminal prosecution process. Even in criminal prosecutions, the suspect or convicted criminal is not questioned before the public outside of any appearance as a witness before a judge.

Rights of the public to access all materials held by the court in a main bankruptcy case are granted directly through the bankruptcy code, as "A paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."[216] The legislative history behind the rule providing access to hearings and trials and the statute above does not provide any reasoning. Lacking any specific historic reference, one commentator and several courts have commented that the provisions in the bankruptcy code concerning access to information filed with the court codify the common law right of public access to judicial records generally acknowledged in Nixon.[217]

Several courts have stated that the reasoning for extensive public access in **bankruptcy is based upon** the needs for creditor access and participation in a specific case: "To at least some extent, this statutory directive for open access flows from the nature of the bankruptcy process-which is heavily dependent upon creditor and public participation, and which requires full financial disclosure of the debtor's affairs."[218] That same court continued, "Thus, bankruptcy cases, by their need for creditor participation and, debtor disclosure, are less protective of privacy and embarrassment concerns than more traditional two party civil litigation."[219]

Rights of access to bankruptcy records for the public at large, not just those creditors with interests in a particular bank-

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decide, the bankruptcy judge will not be the presiding officer at the meeting, and will not be authorized to question the debtor as he is today. If there were to be any disputes resolved there, the judge might be present but will not be present for the examination of the debtor, as this has caused too many problems of the dispute-decider hearing inadmissable evidence.

H.R. S 595, 95th Gong. (1997).

216. 11 U.S.C. § 107(a) (1994).

217. *See In re* **Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994);** *In re* **Foundation for New Era Philanthropy, 23 Media L. Rep. 2498 (Bankr. E.D. Pa. 1995); In re Phar-Mor, Inc., 191 B.R. 675 (Bankr. N.D. Ohio 1995):** *In re* **Nunn, 49 B.R. 963, 964 (Bankr. E.D. Va. 1985); COLLIER ON BANKRUPTCY ¶ 107.02 (Lawrence P. King ed., 15th ed. 1996).**

218. Zn re Foundation for New Era Philanthropy, 23 Media I.. Rep. at 2498.

219. *Id.* **at n.2.**

ruptcy estate, have been found necessary to protect individuals and businesses who may deal with a debtor after bankruptcy:

> A bankruptcy filing is highly pertinent information to commercial enterprises in the geographic area where the debtor resides. Businesses must make daily decisions about entering into credit transactions with members of the public. The legitimate financial interests of businesses will be frustrated if the filing of a bankruptcy case is maintained on a confidential basis. The need of the public to know of the fling of the bankruptcy case, and the right of the news media to obtain and publish this information outweighs the debtors' desire to avoid the embarrassment and difficulties attendant to the filing of bankruptcy. Bankruptcy debtors are not entitled to be protected from publicity about the filing of the bankruptcy case.[220]

Few courts have visited the issue of access to materials in a main bankruptcy case and contested matters. They have all upheld the public right of access recited above.[221]

The few courts faced with au issue regarding public access to materials in adversary proceedings have applied 11 U.S.C.S. §107(a) to the materials in those proceedings without discus-

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220. *In re* Laws, 1998 WL 541821, at *715-14 (Bankr. D. Neb. 1998). . .

221. For access to records in a main case, see *In re* Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994) (licensing agreement in operations of debtor); Simmons v. Deans, 935 F.2d 1287, 1991 WL 106160 (4th Cir. 1991) (unpublished disposition) (petition cover sheet); *In re* Itel Corp., 17 B.R 942 (9th Cir. BAP 1982) (list of creditors); *In re* Barney's, Inc.; 201 B.R 703 (Bankr. S.D.N.Y. 1996) (investment proposal); *In re* Foundation for New Era Philanthropy; 23 Media L. Rep. 2498 (Bankr. E.D. Pa. 1995) (list of creditors): In *re* Ionosphere Clubs, Inc., 156 B.R 414 (S.D.N.Y. 1993) (examiner's records); In *re* Moramerica Fin. Corp., 158 B.R. 135 (Bankr. N.D. Iowa 1993) (list of creditors): *In re* Lazar, 28 Fed. R Serv. 3d 52 (Bankr. C.D. Cal. 1993) (examiner's materials); *In re* Lomas Fin. Corp., 1991 WL 21231 (S.D.N.Y. 1991) (preliminary plan of reor ganization); *In re* Revco D.S., Inc., 18 Media L. Rep. 1591 (Bankr. N.D. Ohio 1990) (examiner's report); *In re* Apex Oil Co., 101 B.R. 92 (Bankr. ED. MO. 1989) (examiner's report and records); *In re* Nunn, 49 B.R. 969 (Bankr. E.D. Vir. 1985) (list of creditors); *In re* Epic Assocs. V, 54 B.R. 445 (Bankr. E.D. Vir. 1985) (list of Creditors); *In re* Bell & Beckwith, 44 B.R 661 (Bankr. N.D. Ohio 1984) (list of creditors); *In re* DeLorean Motor CO., 31 B.R 53 (Bankr. E.D. Mich. 1983) (records of 2604 examination). For access to records in contested proceedings, see *In re* Bennett Funding Group, Inc., 226 B.R 331 (Bankr. N.D. N.Y. 1998) (contested application for interim compensation); *In re* 50-Off Stores, Inc., 213 B.R 646 (Bankr. W.D. Tex. 1997) (hearing on contested retention of professional): *In* re Continental Airlines, 150 B.R 334 (D.Del. 1993) (contested fee application); *In re* Sherman-Noyes & Prairie Apts. Real Estate Inv. Partnership, 59 B.R. 905 (Bankr. N.D. Ill. 1986) (objection CO claim); *In re* Reliable Investors Corp., 44 B.R 904 (Bankr. W.D. Wis. 1984) (contested motion to convert.

sion.[222] However, as discussed previously, adversary proceedings are distinguished in 28 U.S.C.S. §§ 1334 & 157 from cases under title 11. Interpreting the recitation in 11 U.S.C.S. §107(a) to "papers in a case under this title" to include papers in proceedings "related to a case under title 11," as defined in 28 U.S.C.S. §§ 1334 & 157, arguably renders these provisions meaningless. It is thus strongly arguable, that 11 U.S.C.S. §107 does not speak to adversary proceedings. If so, any right of public access to judicial records in adversary proceedings, particularly for suits only related to a case under title 11, arises through the common law as for any other civil suit.[223]

Any of these rights of public access to materials in bankruptcy cases or adversary proceedings are subject to some limitations. These limitations include issuance of protective orders, sealing and redacting materials, and possibly expungement. Imposition of these limitations is allowed through the bankruptcy code, rules of procedure and the common law. Application of these various means to limit access by the courts has been inconsistent and very fact driven.

First, as Congress giveth it taketh away, by providing in 11 U.S.C.S. §107(b) that papers and records filed in a case under title 11, may be protected by the bankruptcy court in order to: "(1) Protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) Protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."

The co&may limit access to the lists of creditors and list of equity security holders filed in a main bankruptcy case for cause shown.[224] In addition, the authority to limit access to certain information in a main case, which is not produced through a contested matter and is not filed with the court, has been found by the courts from several sources.[225]

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222. *See In re* Phar-Mor, Inc., 191 B.R. 675 (Bankr. N.D. Ohio 1995); *In re* General Homes Corp., 181 B.R. 898 (Bankr. S.D. Tex. 1995); *In re* Analytical Sys., Inc., 83 B.R. 833 (Bankr. N.D. Ga. 1987); In *re* Hope, 31 B.R. 423 (Bankr. M.D. Ga. 1984).

223. Of course, in the Third Circuit, this right would rise to one under the First Amendment.

224. FED. R. BANKR. P. 1007(l).

225. *See* FED. R. BANKR. P. 9018:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity *In* respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that

Limitations on access in contested matters are found through FED. R Civ. P. 26(c), made applicable through FED. R. BANKR. P. 9014.

There are few published opinions concerning sealing of materials filed with the court which are generated in main bankruptcy cases or contested matters. The courts that have visited this area have cited to 107(a) and looked to precedent under FED. R Civ. P. 26(c) (7) to interpret the language of 107(b) and the tests to meet under those definitions.[226] Beyond merely sealing a record, debtors have sought to expunge their entire bankruptcy case record.[227]

Only one Court of Appeals has heard an issue involving bankruptcy court records. In *Orion Pictures*, the Second Circuit stated that §107(a) is a codification of the common law right of access to court records.[228] The court also found that §107(b) provides a mandatory list of exceptions to that codified, common law right of access.[229] Two lower courts have taken this proscription farther, finding that the protections afforded under §107(b) are not merely mandatory, but also exclusive to any other protections otherwise found at common law.[230] Other courts have found that §107(b) is a codification of merely a portion of the

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are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

See also In re Handy Andy Home Improvement Ctrs., Inc., 199 B.R. 376 (Bankr. N.D. Ill. 1996) (finding FED. R. BANKR. P. 9018(1) & (3) to authorize the court to protect unfiled documents and other information produced through an uncontested FED. R. BANKR. P. 2604 examination); *In re* Apex Oil Co., 101 B.R. 92 (Bankr. E.D. MO. 1989) (finding that authority to limit access to unfiled documents in a main case may be found in FED. R. CIV. P. 26. through FED. R. BANKR. P.9014, only when production is contested). Many other courts have found the authority in the Federal Rules of Civil Procedure to limit access to unfiled materials to apply in main bankruptcy cases whether objections to production have been lodged or not See *In re* Symington, III, 209 B.R. 678, 685-89 (Bankr. D. Md. 1997); Zn *re* Ionosphere Clubs, Inc., 156 B.R. 414. 433-36 (S.D.N.Y. 1993). Other courts have found no authority to limit access to unfiled materials in a main bankruptcy case exists without objections. See *In re* Dinubilo, 177 B.R. 932 (E.D.Cal. 1993); *In re* DuPont Walston, Inc., 4 Bankr. Ct. Dec. 61 (Bankr. S.D.N.Y. 1978).

226. See *supra* note 221.

227. *See In re* Cortez, 217 B.R. 538 (Bankr. S.D. Tex. 1997) (applying Fair Credit Reporting Act); *In re* Whitener, 57 B.R. 707 (Bankr. E.D. Va. 1986) (applying § 107(b)(2)).

228. See *In re* Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994).

229. *See id.* at 27-28.

230. *See In re* Phar-Mor, Inc., 191 B.R. 675 (Bankr. N.D. Ohio 1995).

protections against access found under the common law.[231] These courts find that other bases for limiting access under the common law remain available.[232]

The boundaries on limitations to public access to materials in adversary proceedings are less clear. Depending upon the applicability of §107 to adversaries, the grounds for limiting access in both §107(b) and FED. R. BANKR. P. 7026 may apply. If §107 does not apply to adversaries, then the grounds for limiting access discussed in the previous section on civil suits, primarily the definition of judicial records and precedent established under FED, R. CIV. P. . 26(c) will apply, Several courts, without referring to any difference between the records held by the court in a main case and an adversary proceeding, have applied the precedent of the civil suits as regards the definition of judicial records.*" Sounding much as the courts hearing civil suits, these courts find that, "The smaller the role documents play in the adjudicative process, the less of an Interest the public has in them.""[233]

A dichotomy emerges when one compares public access rights to proceedings in bankruptcy with those rights in civil and criminal cases. It appears that the public is afforded access rights to proceedings and records in the main bankruptcy case, and any associated contested matters, most similar to the level of access rights found in criminal prosecutions. Public access rights to proceedings and records in adversary proceedings, however, are equivalent to those found in civil suits.

In the pre-adjudication phase of each of these three areas of the law, information gathering,. and disputes over that gathering, predominate. In civil suits, the products of discovery and the process itself are private between the parties. There is no public access rights to depositions, which are held privately, nor to materials, which are often not filed with the court and even if filed may be outside the scope of judicial records subject to pub lic access rights. Hearings before a judge, and those materials

291. *See In re* Bennett Funding Group, Inc., 226 B.R. 331, 3.36 (Bankr. N.D.N.Y. 1998); *In re* 50-Off Stores, Inc., 213 B.R. 646, 659 (Bankr. W.D. Tex 1997).

232. *See* id

233. *See In re* Bennett Funding Group, Inc., 226 B.R. 331 (Bankr. N.D.N.Y. 1998); *In re* Ionosphere Clubs, Inc., 156 B.R. 414 (S.D.N.Y. 1993); *In re* Apex Oil Co., 101 B.R. 92, 99 n.10 (Bankr. E.D. MD. 1989) ("the Underlying Documents are notjudicial records in that they have not been filed and they are not being used by proponents in the resolution of substantive legal rights"); *In re* Sherman-Noyes & Prairie Apts. Real Estate Inv. Partnership, 59 B.R. 905 (Bankr. N.D. Ill. 1986).

234. *In re* Apex Oil Co., 101 B.R. at 102.

the judge uses to make substantive findings, are subject only to a common law right of public access, which is limited by both the court's ability to seal for good cause and the possibility of a finding of constitutional interests overriding the interests of the public to know.

In criminal prosecutions, the products of discovery and the process itself are private. Depositions, interrogations and other forms of questioning, while compelled, are still held outside of the public eye. Materials found through investigations are, as with most civil discovery materials, not filed with or held by the court. The various hearings held before a judge at this point are numerous, and the public is afforded a right of access to the hearings through the First Amendment, a much stronger right than that afforded to civil hearings, subject only to overriding constitutional interests of the accused and third parties.

Information gathering in the main bankruptcy case closely parallels the process of compelled questioning in criminal prosecutions. However, while questioning is held privately in criminal prosecutions, it is in fact held publicly for most proceedings in bankruptcy,[235] even if not required by law. In addition, the information gathered is mandated by law and rules of procedure, unlike in civil suits. Further, a statutory and common law right of public access is afforded any materials filed with the bankruptcy court, whether those materials rise to the level of judicial records or not,[236] subject to a much more limited ability to 'seal records than that found in civil suits.

Information gathering in adversary proceedings is equivalent to that in civil suits. The information is gathered in private, and arguably, the public is afforded the same access rights under the common law to any judicial records as in any civil suit.

In the adjudicative phase of each of these three areas of the law, admission of evidence to the judge or jury predominate. In civil suits, the hearings and trial are open to the public under the

235. Most first meetings of creditors arc generally held as a trailing docket They are most often held outside of federal buildings and not in a courtroom. All debtors and creditors are present, listening to the depositions of the others, along with anyone else who happens to attend.

236. In approximately 80% of the cases in this district, no hearing is ever held before a judge. In most cases, the orders discharging and closing the case are the only orders entered in the case. In many districts, authority to sign the orders discharging and closing the case is delegated to the clerk, and a judge is not involved in the case at all and never sees any of the materials held by the clerk. Indeed, outside of some creditor motions to release liens, abandon property or modify the automatic stay, judges rarely see any of the information generated in this portion of the case.

common law, limited by the sound discretion of the trial judge. In criminal cases, the hearings and trial are open to the public under the First Amendment, limited only by a overriding constitutional interest of the accused or a third party. In contested matters in a bankruptcy and adversary proceedings, all hearings and trials are open to the public pursuant to a rule of procedure containing no enumerated exceptions.*"

Finally, the post-trial proceedings and information gathered in criminal prosecutions is quite similar to the information gathered in case opening and initial examinations of the debtor in a main bankruptcy case. However, while the information gathered is similar in scope, the level of general public access afforded to that information in bankruptcy greatly exceeds that afforded in the criminal prosecution.

The information gathered in a criminal pre-sentence investigative report mirrors that found in the bankruptcy petition and accompanying schedules and statements:

> The presentence report describes the defendant's character and personality, evaluates his or her problems, helps the reader understand the world in which the defendant lives, reveals the nature of his or her relationships with people, and discloses those factors that underlie the defendant's specific offense and conduct in general.[238]

Similarly, 'preliminary bankruptcy documents contain information which helps the *reader* understand the world in which the defend&t lives. It describes what he does for a living, 'where he works, how long he has worked there, and reveals the nature of his relationships with people by showing where he lives, how long' and to some extent whom with, and the contents of his home. It describes the defendant's character and personality by showing life circumstances such as what he reads, medical problems, where he spends his income, detailed cash flows, information on schooling, any businesses entered into, lawsuits pending, and if and where he attends church.

Further similarities between bankruptcy and criminal prosecutions can be found by comparing the presentence investigation in criminal proceedings with the examination of the debtor's affairs in bankruptcy. In criminal prosecutions, the

237. Those few published opinions discussing closure of hearings and trials refer to 11 U.S.C. § 105 (1994) and FED R. BANKR. P. 9018 for authority to order any relief that justice requires, including closure.

238. United States V. Corbict, 879 F.2d 224, 230 (7th Cir. 1989) (citing PROBATION DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED *STATES* COURTS, THE PRESENTENCE INVESTIGATION REPORT 1 (2d ed. 1984)).

"[s]entencing proceedings, and particularly the presentence investigation, often involve a broad-ranging inquiry into a defendant's private life, not limited by traditional rules of evidence,"[239] while examinations of the debtor at the meeting of creditors, 2004 examinations and investigations by the trustee are "extremely broad and Collier indicates that [they are] in the nature of an inquisition and consequently the field of inquiry is wide and within the limitations prescribed any question is permissible which seeks to ascertain facts concerning debtor's conduct, property and affairs."[240]

Presentence investigation reports are considered confidential and are filed under seal; third party public access is not allowed except upon a showing of a compelling, particularized need for disclosure.[241] The basis for this policy is found through comparisons of the procedures, information and privacy interests of parties in the presentence investigation with those in a Grand Jury proceeding.[242] This same type of comparison to Grand Jury proceedings and privacy interests has been made in conjunction with the examinations of the debtor's affairs in bankruptcy.[243] A strong argument can be made that the same policies of confidentiality and general public access found applicable to presentence investigation materials should also apply to information concerning debtor's affairs in a main bankruptcy case.

IV. THE GOALS OF COLLECTION AND PUBLIC ACCESS

The information collected and filed with bankruptcy courts is presented, ostensibly to effect the purposes underlying the bankruptcy law: equitable distribution of a debtor's assets to

239. *Corbitt*, 879 F.2d at 230.

240. *In re* Larkham, 24 B.R 70. 72 (Bankr. D. Vt. 1982); *see also In re* Lazar, 28 Fed. R Serv. 3d 52 (Bankr. C.D. Cal. 1993); *In re* Ionosphere Clubs, Inc., 1.56 B.R. 414 (S.D.N.Y. 1993); *In re* Woods, 69 B.R. 999, 1004 (Bankr. E.D. Pa. 1987); *In re* Baldwin United Corp., 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985); *In re* Vantage Petroleum Corp., 34 B.R. 650 (Bankr. E.D.N.Y. 1983).

241. *See* United States v. Huckaby, 43 F.3d 135 (5th Cir. 1995); Corbitt, 879 F.2d at 224; United States v. McKnight, 771 F.2d 388 (8th Cir. 1985); United States v. Charmer Indus., Inc., 711 F.2d 1164 (2d Cir. 1983); United States v. Martinello, 556 F.2d 1215 (5th Cir. 1977); United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976).

242. Corbitt, 879 F.2d at 231-32.

243. *See In re* Baldwin United Corp., 46 B.R 314, 317 (Bankr. S.D. Ohio 198.5) (comparing the investigation of debtor's affairs by examiner to a "civil grand jury"); *In re* Ionosphere clubs, Inc., 156 B.R. 414, 432 (3993) (sealing materials on investigation of debtor); *In re* Mantolesky, 14 B.R. 973 (Bankr. D. Mass 1981) (holding an examination under bankruptcy is an inquisition); *In re* Larkham, 24 B.R. 70, 71 (finding meeting of creditors to be a broad inquisition).

creditors and a fresh start for the honest, but unfortunate debtor. To accomplish these goals quickly and efficiently, forms and procedures have developed to assist in locating estate assets, identifying creditors with valid claims to those assets, distributing the assets equitably to those creditors and identifying debtor and creditor fraud.

In light of these goals, the threshold question to be answered before the issue of access becomes whether the information collected is legitimately needed to meet the needs and goals of the bankruptcy process. One measure of the relevance of information may be the frequency of objections to presenting the information or appearing at meetings. Another measure may be the frequency of requests to review types of information and documents.

The documents and proceedings eliciting the most personal, probing information of debtors, the case opening documents and first meeting of creditors, are found in the administrative portion of a bankruptcy case. The judge is not involved in the first meeting of creditors, and outside of business cases, it is extremely uncommon for the judge to use the petition, schedules and statements to gather information. The bankruptcy clerk's office uses the cover sheet information to identify a case, the attorney concerned and for the statistical information. supplied, but does not use the other case opening documents. While the court does not use the schedules and statements, they are some of the most frequently reviewed documents in a case. They ire reviewed by trustees, creditors named in the schedules, and other parties who are trying to determine if they area creditor in the case.

While the case opening documents probably contain the most private information of debtors,, the attachments to proofs -of claim, along with the increasing ability to search multiple cases for references to a specific creditor, provide the most private information concerning creditors. Again, the proof of claim is presented in the administrative portion of a bankruptcy case and is rarely reviewed by a judge, except for objections based on late filing. The claims are used by trustees and debtors-in-possession and reviewed by other creditors. The proof of claim form itself must be filed and the content is not controversial. The relevance and need for the attachments to the claim is not a subject of discussion. Attachments to claims supply information needed to substantiate a claim, serving a legitimate purpose under bankruptcy law and procedure by alleviating the need to object to every claim, and therefore, eliminating unnecessary hearings and judicial involvement in administrative matters.

The onset of electronic records and clerk's databases allows probing searches for creditor information across all cases, providing views of forms and accounting procedures used by creditors, customer lists and a review of a creditors uncollectible accounts receivable. Depending on the number of cases a creditor is involved in and the information it supplies as attachments to proofs of claim, a very detailed financial and operational picture of a business can be compiled.

Other documents and pleadings are necessary to claim rights under various sections of the bankruptcy code or other law. Most of these other documents are presented in those portions of a bankruptcy case that are not administrative and require review and determinations under the law by a bankruptcy judge. The relevance of these documents and any attached materials are subjects for hearings before the judge.

Excluding the requirement to provide social security numbers, the information requested of debtors and creditors in the administrative portion of a bankruptcy case in opening documents and assertions of claims is rarely challenged as irrelevant or overreaching. In addition, objections to appearing at the first meeting of creditors are equally rare. In contrast, objections to appearing and supplying information at Rule 2004 examinations and in discovery in adversary proceedings are common.

As stated previously;-outside of discovery disputes, the collection of social security numbers elicits the most frequent and growing number of challenges. 'While there are- few published opinions regarding this issue, clerks' offices receive' several petitions each year where debtors or petition preparers at first refuse to supply their social security number.[244] Those clerks' offices that provide access to pleadings over the Internet relate increasing instances where parties object to having their social security number displayed. As discussed, the social security number is used by creditors to 'identify debtors and link their account records, and by trustees and the Office of the United States Trustee to identify unlawful filings of bankruptcy petitions. Queries regarding identifying information, especially the social security number, are probably the most frequent requests for information received at clerks' offices. These uses clearly serve a legitimate need in the bankruptcy process.

It is arguable that social security numbers should not be required of debtors, and they definitely should not be offered for

244. See In *re* Crawford, 194 F.3d 954 (9th Cir. 1999); In *re* Adair, 212 B.R. 171 (Bankr. N.D. Ga. 1997); *In re* Anderson, 159 B.R. 830 (Bankr. N.D. Ill. 1993); In *re* Austin, 46 B.R. 358 (Bankr. E.D. Wis. 1985).

general public access. The purposes cited for requiring these numbers are legitimate public purposes, preventing fraud and increasing efficiency by quicker identification of debtors and protection of creditor rights. However, these numbers are used too often to commit crimes.

Prior to the ability to catalog and compare more extensive information in a database, the social security number supplied the easiest and only way to meet these purposes. The social security number remains the easiest means to both identify debtors and other parties and to determine if a filing is lawful. However, new technology now provides other means to accomplish the legitimate need for identification. Inclusion of other information in a database such as multiple debtor addresses, employers, specific identification of secured collateral and creditor identification can collectively help identify debtors and parties using search and compare abilities lacking under previous technology. Placing this information in a searchable database will require labor, and the programs and equipment to provide the search capabilities will require funding, but these other means do exist today, lending question to the legitimacy of continued use of social security numbers in the bankruptcy process.[245]

While for the most part, the information collected is relevant and legitimately meets a need under the bankruptcy process, it should also be asked preficatory to questions of access rights; whether the information should be collected by the courts or others. Bases for these decisions are found through the inter-, play between the demographics of the users of the information and practicality and political considerations.

Arguably, if the court does not use a class of materials, it should not be filed with the court. In both civil and criminal contexts, the only materials filed with the court are those for which there is a high probability of use by a judge. As a consequence of this line of reasoning, the schedules and statements of affairs should probably not be filed with the courts. In the majority of bankruptcy cases there is no expectation that these documents will be used by a judge. They will never lie under the definition of a judicial record as that term is developing in the courts. Considerations of practicality also bear against filing these documents with the court. Due to budget restraints and

245. Courts in other countries often provide their own, unique identifiers to parties, which presumably can be cross checked to look for other cases with which that person may be involved. See Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 563 (1998) (discussing German practice and the *Bundesbaten Schutz Gesetz*).

limits on the number of judges, any bankruptcy court desires to collect only that information which it needs to adjudicate issues brought to it and to send out notices it is required to send. The ill considered collection of information by the courts simply because it is used by some parties burdens both judges and the court system, which must index, store and provide access to it.

Scant records of past discussions on this issue indicate that the opening documents were envisioned to be filed with the Office of the United States Trustee.[246] This place of filing is most logical because the U.S. Trustee, trustees appointed and overseen by that office and, to a lesser extent, creditors are the parties using these documents. While logical, filing with the U.S. Trustee would require an infrastructure of personnel, office space and equipment which that office does not possess nor is likely to receive funding to provide.

With these considerations in mind, the court could continue to act as the place of filing of all information in a bankruptcy case. The burden of filing and storage would remain on the court. However, differing rules applicable to access for the different classes of documents could alleviate the current burden of providing unlimited access. Legislation could be enacted defining these documents as agency records of the Office of the United States Trustee.., Physical and/or electronic means could then be used to distinguish between the types of records for access purposes. This type of distinction or segregation, has already been considered by the courts in order to meet access and filing requirements for income tax returns under, proposed legislation. While such distinctions would have. been difficult to provide under old technology, electronic forms of documents and information make them simple.'. This means of filing'would allow a compromise between the goals of the court system with those of the practical considerations relating to any requirement that case opening information belong to the U.S. Trustee system.

Finally, we can reach the central issue of access to the information and proceedings in bankruptcy. Resolution of this issue follows answering several questions. What are the bases for the current system of access? What are the problems. of the current system? What benefits does access provide? What harms do the current levels of access cause? Do the benefits outweigh the harms? If changes are needed, what alternative access structures would be more balanced in today's technology?

As discussed previously, under the bankruptcy system today, levels of access rights are bifurcated. The general public is

246. *See supra* note 189.

afforded nearly unlimited access to records and proceedings in the main bankruptcy case. The general public is afforded much more limited access to records and proceedings in adversary proceedings, similar to access provided in civil cases. How or why the current levels of access were determined or why they vary is not clear. Current access levels probably arose as the schizophrenic outcome of the interplay between the traditional faction, which considers the debtor an admitted criminal upon filing and bankruptcy analogous to a criminal sentencing process, and the liberal faction, which regards bankruptcy as a rehabilitative process for debtors, which attempts to lessen creditor contests over limited assets.

No matter the circumstances behind its development, the current access rules have several problems. They are confusing due to the lack of uniformity of access to records between various portions of a case. The access rules as regards the main bankruptcy case are inconsistent with the treatment ofjudicial records overall and even similar records in civil, criminal and other government contexts. Further, due to new technology, current access rights in bankruptcy impinge unnecessarily on privacy rights, thus threatening individuals and the courts.

These shortcomings are magnified in the new electronic environment as evidenced by the increasing complaints relating to privacy fears. As the balance between privacy and 'public access that existed in fact under the old technology, if not under the law, is tipped, we are left with unthought of consequences. Certain records and information in the main bankruptcy case, public under the current system, should probably no longer, be assumed public, and in some instances, alternate information should be collected.

Arguments advocating keeping the current levels of public access to bankruptcy information and proceedingsin the-main bankruptcy case cite 'to five general categories of benefits provided by this access. First, general public access forces integrity in the bankruptcy system by placing all that happens under harsh public scrutiny. Second, flowing from forced integrity, general public access helps to maintain confidence of the public in the bankruptcy system. Third, general public access allows "accurate, reliable data about the bankruptcy system" to be collected, aiding evaluation and speeding change to bankruptcy laws and processes.*" Fourth, access to all bankruptcy information by the

247. See NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS (1997); Joseph A. Guzinski, *Government's Emerging Role as* a Source *of Empirical Information in Bankruptcy Cases.* 17 AM. BANKR. INST. J. 8

general public helps lenders to make better informed decisions on extending new credit, thus helping to alleviate harm to creditors and contributing to efficiencies in the credit markets.[248] Finally, access to all information in a specific case by that debtor's creditors is necessary because those creditors are the new interest holders in the estate and are entitled to know everything, even otherwise private, about the debtor and estate in order for the bankruptcy process to work.[249]

Clearly, all of these goals are legitimate needs and interests. The first three points reflect the general interest of the people in monitoring and evaluating a government process. As it regards bankruptcy, this interest is reflected in the ability to review the effects of the law as a whole and the actions of individual judges applying that law. The fourth point reflects the interests of the commercial segment of the public, and to a much lesser extent the general public, to use the credit information gathered in the bankruptcy process for uses other than adjudicating a case. The fifth point raises an issue that can be characterized as structural to the bankruptcy system in that information is vital to creditors who play a large role as parties in specific cases and thus are a contributory part of the bankruptcy system.

Arguments advocating altering the current levels of public access to bankruptcy information and proceedings cite to six general -categories of harms from. this access. First, unlimited access. impinges unnecessarily on privacy rights,, by providing more access than is necessary to achieve the public benefits of evaluating and- monitoring a government process. Second, unlimited access and dissemination rights under new technology chills those seeking redress under the bankruptcy laws through the courts of the use of the rights to use the courts. Third, unlimited access limits the fresh start, an integral element of the bankruptcy law, by placing a stigma upon debtors and limiting access to new extensions of credit. Fourth, current access levels result in inconsistent and discriminatory treatment of parties and information across federal causes of action. Fifth, unlimited access and dissemination rights contribute unnecessarily to threats of physical harm to parties. Finally, unlimited access and dissemination rights contribute unnecessarily, and probably cause, economic harms to parties, identity theft, credit fraud and

(1998); Should You be Able to Access Bankruptcy Files from the *Internet?*, 32 Bank. Ct. Decisions 1 (1998).

248. See *In re* Laws, 223 B.R 714 (Bankr. D. Neb. 1998).

249. *See In re* 50-Off Stares, Inc., 213 B.R. 646, 654 (Bankr. W.D. Tex. 1997).

lender redlining, which would not occur with more limited forms of access.

The first two points relate to the legitimate purpose of balancing and protecting constitutional rights of all types of parties through limits on access. The third point reflects the need to consider all the goals of the bankruptcy system in determining access levels. The fourth point reflects the need for consistency in protecting information required by the courts. The final two points relate to recent concerns raised due to new technology and reflect the need to consider the ramifications of access no matter the type of technology available.

Determining whether the benefits outweigh the harms requires a discussion of the points raised by each side, including the merit and magnitude or contribution of the benefit or harm, Since those arguing change do not dispute that some level of access is necessary to provide for the legitimate public purposes recited, it would be most productive to look at the merit and magnitude of the harms claimed from extensive access.

The first harm stated, unnecessary intrusion on the right to privacy, is perhaps the greatest harm. The right of privacy is a fundamental, constitutionally protected right, so While so protected, debtors seeking relief under the bankruptcy code acquiesce to some invasion of their privacy rights. Advocates of limited disclosure argue that while debtors agree to supply private information for the limited purpose of administration of their bankruptcy case, it doe's not follow that they also are agreeing to full- disclosure to all the world. They argue further, that while full access of parties to the ease to the information collected is necessary to administer the case, it does not follow that unlimited access to the general. public is required or necessary for that administration. They state that, "the fact that an event is not wholly 'private' does not mean that an individual has no interests in limiting' disclosure or dissemination of the information."[251]

The basis given for requiring such extensive access is the probability of participation from unlisted third parties in a case, whether as a creditor newly come forward or as informant supplying information on assets transferred by fraudulent debtors. While this purpose is laudable and legitimate, advocates of limited access argue that it is not being fulfilled by unlimited access. Very rarely does public participation from publication of bank-

250. *See supra* Pt. II.

251. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770-71 (1989) (citation omitted).

ruptcy information come as a result of the public broadcast of information from court records by the media and, certainly, the general public does not come to the courthouse to randomly peruse bankruptcy case files. Most queries received at the court from third parties come from entities and individuals who heard from a debtor or a creditor that had received a notice directly from the court that a specific debtor had filed, or from lenders who are not trying to participate in a case but are using the court as a free credit reporting service. In other words, members of the general public do not participate in bankruptcy cases because they hear of them from the news media or because they avail themselves of unlimited access to the courts.

Advocates argue further that provision of records on the Internet will not change this result. People will not go to a court website everyday to review newly filed cases to determine if they should participate in a case. They will not read newspapers or newspaper websites daily to review a list of those who filed bankruptcy to determine if they should participate in a case. They will acquire bankruptcy information under the same circumstances as they do with paper records, from debtors and through the grapevine from those creditors who received notice directly from the court about a case.

Advocates of limited disclosure are, therefore, correct Privacy rights are being unnecessarily invaded because the purpose sought to be served is not served by the access currently allowed.

In addition; advocates-of limited-disclosure argue that treatment of private information in- bankruptcy is inconsistent with protections afforded that same information in other contexts. Most of the information supplied by debtors is financial, other information in the petition regarding one's family, medical services received and religious affiliations fall under specific areas where the Supreme Court has spoken to constitutional protections of privacy, Add ' to the list, social security numbers, and almost every part of the opening documents in an individual bankruptcy case are either specifically protected private information or information that is afforded very restricted access in other venues.[252]

Outside of social security numbers, there is little argument that this private information is needed to properly administer a bankruptcy case and protect creditor rights. However, the point is well made that the means necessary to meet these needs differ

252. See Methodist Hosp., Inc. v. Sullivan, 91 F.3d. 1026, 1031 (7th Cir. 1996); *In re Knoxville* News-Sentinel Co. Inc.. 723 F.2d 470, 47678 (6th Cir. 1983): Rhinehart v. Seattle Times Co., 654 P.2d 673, 680-82 (Wash. 1982).

greatly from the amount of access necessary to monitor the bankruptcy system or provide for participation of third parties in a specific case.

While the point raised regarding this harm has great merit, the magnitude of the harm from current unlimited disclosure is a subject of debate. The magnitude of this harm varies with the measurer. While one *is* horrified at disclosure of his or her own financial affairs, one usually doesn't think twice about disclosure of those same affairs of others.[253]

It will always be difficult to measure the current harm from loss of a fundamental right. However, the fact remains that society as we know it depends upon these fundamental rights. It should always be asked if the need espoused cannot be filled in any other way before so easily giving up such fundamental rights as privacy. Chipping away at fundamental rights is indeed an insidious danger.

Those in favor of unlimited access also argue that the magnitude of the invasion of privacy is in actuality low and debtors receive a trade off, bankruptcy relief for loss of privacy. That leads into questions of the propriety of relinquishing one constitutional right to exercise another.

Proponents' arguments regarding chilling of access to the courts for redress under the bankruptcy laws may be considered amusing and facetious in light of the number of bankruptcy cases filed in the last ten years. This great level of filing occurred in spite of unlimited access to paper records. Under these circumstances, it is difficult to sustain an argument that disclosure of private facts-in bankruptcy chills debtors from accessing bankruptcy courts.

Advocates of limiting access argue that while it is true that disclosure does not chill access to the courts with paper records, with electronic public dissemination of the private information in bankruptcy tied to social security numbers and other personally identifiable information, the probability increases enormously that filing may indeed be chilled. They also argue that one should not have to give up one constitutional right, the right to privacy, to exercise another constitutional right, the right to seek redress through the courts because:

> [t] here is no single divine constitutional right to whose reign all others are subject. When one constitutional right cannot be protected to the ultimate degree without violat-

253. See introduction of this paper; Glenn R. Simpson, *Plan to Release Judge's* Financial Data by *Online Concern is Blocked by Court,* WALL ST. J., Dec. 8, 1999, at A10.

> ing another, the trial judge must find the course that will recognize and protect each in just measure, forfeiting neither and permitting neither to dominate the other.[254]

While the right to seek redress through the courts is often espoused, the extent of any such right is fuzzy.[255] It is clear that there is no right of access to the bankruptcy court under the Due Process Clause of the Fourteenth Amendment.[256] However, some type of right to access bankruptcy court exists under other constitutional provisions as has been found in other contexts.[257] "It is also true that, [i]f the debtor did not file bankruptcy, that information would almost never be available on demand to the public at large (and certainly not under penalty of perjury)."[258] Moreover:

> Rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.[259]

Advocates of limiting access argue that the goals stated to justify unlimited access, participation of unknown members of the public in a specific case and protection of creditor rights, can be met by more limited access, which protects redress through the court. They argue that the level of access currently provided is not present just for the goals stated, but is there for other purposes. In particular, they state that the underlying purposes for unlimited access include discouraging debtors from filing and using public employees' and funds to collect information for commercial purposes outside of the needs of bankruptcy. They argue that these unstated purposes are filled at too high a cost to privacy and the bankruptcy system.

Indeed, publication of extremely private, personally identifiable information is a strong impetus against filing. If discourag-

254. United *States* v. Chagra, 701 F.2d 354,365 (5th Cir. 1983).

255. *See* Carol R Andrews, *A* Right *of Access to Court Under the Petition Clause of the First Amendment: Defining* the *Right, 60* OHIO ST. L.J. 557 (1999); J. Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be permitted to Keep Identities Confidential?, 37* HASTINGS L.J. 1 (1985).

256. *See* United States v. Kras, 409 U.S. 434 (1973).

257. *See* McDonald v. Smith, 472 U.S. 479 (1985) (Petition Clause of the 1st Amendment); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (Petition Clause of 1st Amendment); Blake v. McClung, 172 U.S. 239 (1898) (Article IV, Privileges & Immunities Clause).

258. In *re* 50-Off Stores, Inc., 213 B.R. 646, 654 (Bankr. W.D. Tex. 1997).

259. Rhinehart v. Seattle Times Co., 654 P.2d 673, 689 (Wash. 1982).

ing filing through the invasion of privacy caused by unlimited access is a basis for providing such access, losing rights to privacy seems a high price to pay when a lessor cost, redrafting the bankruptcy statute to embody more difficult filing requirements or lessened benefits to filing, would provide a better and more balanced solution to the perceived problem.

Arguments of proponents for limiting access regarding the fresh start seem specious. The public should be able to review credit information and be advised that debtors have defaulted, pay slowly or have filed bankruptcy. Even assuming that the release of information by the court harms the fresh start, the magnitude of that harm must be small. Discharged debtors have more opportunity to receive credit than ever before. Many creditors even seek out and solicit extensions of credit to newly discharged debtors because they cannot receive another discharge for the next seven years. While this argument appears to have much lesser merit, it is also true that the public should not use the courthouse as a credit reporting agency, and the question becomes where the public should receive credit information.

Next, one can argue that access by third parties to materials in bankruptcy should be consistent with the level of access provided to similar materials in civil or criminal- cases. One can argue that the difference in access is discriminatory against debtors in bankruptcy in two ways. First, discovery materials containing 'similar private information submitted as required through the Federal Rules of Civil Procedure are given more protection from disclosure than the same infoxmation submitted in a bankruptcy case. Second, specifically as regarding the opening documents in a main bankruptcy case, one can argue that these documents are analogous to presentence investigative reports in both content and usage, and therefore, case opening documents: are given less protection from disclosure than the same type of document in a criminal case. Finally, it can be argued that the same opportunities to abuse the forced discovery in civil cases exist in bankruptcy and the rationale behind the decision in *Seattle Times* should be applied to protect the debtor and other parties drawn into a bankruptcy case.

In rebuttal, advocates of disclosure argue that the forced discovery attendant in both opening documents and the required deposition, the first meeting of creditors, meet the goal of extremely speedy administration of bankruptcy cases; time is money. In conjunction with this goal, unlimited public access will inform the public faster and lead quickly to both addition of any new, unlisted creditors and to information of unknown preferential or fraudulent transfers. In consideration of these goals

then, access to information must be greater than that allowed in a civil case.

Unquestionably, most of the information required in bankruptcy case opening documents is relevant, and requiring the information to be provided at the time of filing clearly meets the goals of speedy administration. No one appears to argue that this goal has no merit or that another system of data collection or discovery would better serve administration of cases. The second point concerning unlimited disclosure and participation of third parties in a case is much weaker. If unlimited disclosure was truly successful in meeting this goal, an argument could be maintained to keep such disclosure; however, as discussed previously, there is no evidence that unlimited disclosure serves this goal. Third parties do not receive information on cases due to unlimited disclosure. They receive information from the debtor and through the grapevine, from creditors who received their information due to the noticing requirements of the court in the Federal Rules of Bankruptcy Procedure.

No matter one's position on this point, the difference in treatment looks discriminatory. Indeed, to the extent bankruptcy case opening documents can validly be analogized to presentence investigative reports, it appears that those who commit the "crime" of, bankruptcy receive fewer privacy protections than those who commit other crimes.

Finally, the points raised regarding physical and economic harms grow in; merit with evety passing day as reported accounts of identity theft and credit fraud increase exponentially. While claims of these harms have merit, it is argued that the magnitude of the harms is small, as they are speculative and hypothetical and the probability of these harms befalling any single debtor are low. While true even ten years ago, this argument loses strength every day as the reported cases of these harms increase. Currently, the bankruptcy electronic database is ripe for identity theft crimes and also provides a ripe ground for stalking individuals. While it is true that the probability remains fairly low that any one individual will suffer these harms from access to the electronic bankruptcy database, the probability that this database will be used to support such crimes is very high, especially when compared to the probability of use of the paper data files for such purposes.

This discussion establishes that privacy, a fundamental, constitutional right, and the right to seek redress under the laws through the courts, another constitutional right, are being harmed unnecessarily through application of common law and statutory rights of access to bankruptcy records. In addition, it

appears that the goals sought to be reached by providing the statutory level of access in bankruptcy, though laudable, are not successfully being met through that access. Therefore, not only is the balance of rights inverted due to current access levels, but the threat and probability of physical and economic harms befalling individuals is greatly increased unnecessarily because of it.

So, what level of access or privacy should be 'provided under the law? "How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors?"[260] How can the courts serve the public interests and not be "catering to prurient interests without proper public purpose or corresponding assurance of public benefit"[261] even though it is true that "[o]nce a matter is brought before a court for resolution, it is no longer the parties' case but also the public's case"?[262]

First, in evaluating any changes to access levels, one must consider both the state of access law and the goals of the bankruptcy system. At this time, no right to unlimited access to government records has been found to exist under the Constitution or common law.[263] Unlimited access to records held by the courts is also not provided in either civil or criminal contexts. However, access by parties involved in a specific bankruptcy case to wide ranging information on debtors is necessary for the bankruptcy system to work

Based. upon these considerations, access levels' to Personal identifiers should be changed to reflect the level of participation of the requesting party to a specific case. Parties involved-in a case should receive expansive access. However, the general public should only be provided access. to those records -where it serves the interest of the public in monitoring the process, a goal successfully met by various circumscribed-levels of access.

Most of the interests stated by advocates of expansive access should and can be served through some limited form of access. The interests in quickly bringing unknown parties into a case and in discouraging filing should be served by means other than access to court records.

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260. Shulman. v. Group W Prod., Inc.. 955 P.2d 469, 474 (Cal. 1998).

261. *In re* Application of KSTP Television, 504 F. Supp. 360, 362 (D. Minn. 1980).

262. Brown v. Advanced Eng'g, Inc., 960 F.2d 1013, 1017 (11th Cir. 1992).

263. *See* L.A. Police Dep't v. United Reporting Publ'g Corp., 120 S.Ct. 483 (1999); Houchins v. KQED, Inc., 438 U.S. 1 (1978); Zemel v. Rusk, 381 U.S. 1 (1965): Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994); Calder v. IRS., 890 F.2d 781 (5th Cir. 1989).

Access to the documents and information in specific cases, stripped of personally identifiable information, names, addresses, telephone numbers and social security numbers, should still provide all the information necessary to monitor the system as a whole, its application to specific individuals and individual entities. Even stripped of personal identification, enough information will be disclosed to evaluate debtors, the nature of debts, the administration of a case, and whether particular debtors, creditors, trustees or attorneys are receiving discriminatory treatment. In addition, this level of information retains enough character to identify the trustee, attorneys and judge involved to evaluate their respective performance. Further, access to the personally identifiable information by the court and Office of the United States Trustee should provide adequate ability to search for fraud and serial filing, especially considering that these are the entities that currently perform this function anyway.

Those materials that have infinitesimal probability of becoming judicial records and that contain information which can be provided to the judge by other means when necessary, in particular the petition, schedules, statements of affairs and creditor lists, could be held and access provided as applicable to the records of executive agencies. The access requirements and limitations of the Freeedom of Information Act would presumably apply and could be administered by the court.

. . . While the first three interests of expansive access advocates can be served through electronic records by similar means as those used in other government record contexts, such as removing personally identifying information from case data before releasing it to the general public as discussed above, 'the' fourth and fifth points require more. Under the fifth point, the role of all parties in a case requires the ability to identify the debtor and other parties, and to receive complete information on debtor's affairs no matter how personal. Unarguably, parties involved in a specific case need some type of personal identification information of other parties and probably should receive this information from the courts to protect due process rights. In addition, third parties not listed in a case should be provided adequate information to determine if they are involved.

Under the fourth point, the access needs of the commercial interests in society also require personally identifiable information on specific cases and ultimate case status. It is harder to justify any access to personal identification information from court records for commercial third parties, as the benefits they seek from access are not related to monitoring the government function of the courts or contributing to the bankruptcy process.

However, it is also important to place value on the societal interest of the smooth flow of credit. The question under the fourth point becomes whether the courts should be the source of this information, or whether commercial third parties should rely on the other available sources which have this information and from which they receive all the other information they hold. The bankruptcy courts should not be a master credit bureau where lenders and commercial credit bureaus come for information. Credit bureaus receive most other information directly from lenders and should receive information on a bankruptcy filing from the same sources. Those lenders seeking information prior to extending credit should look to the credit bureaus for that information, not the bankruptcy court.

V. SOLUTIONS

The long term solution to these concerns requires action by Congress and many changes by the courts and debtors' counsel. The major requirement for long term change requires the judiciary, or another group, to propose changes to 11 U.S.C. $107. The most efficient change would be to eliminate it. Doing so would place access to bankruptcy records on the same foundations as access in other proceedings in the federal courts. Should such a change be untenable, legislation will be needed amending 11 U.S.C. §107 in two ways. First, language should be added stating that, though filed with the courts; the petition commencing a case and associated documents filed at case opening are not judicial records. Second, existing language in 11 U.S.C. §107 should be amended to provide that the same rules of access 'apply to judicial records in bankruptcy as in any civil case. Any amendment to define the term judicial records is probably. premature and confining. ,

After making these statutory changes, processes will have to be derived that effect the intent of the changes. Any such new procedures adopted have to provide for the short time frames of the bankruptcy process. In addition, they must provide adequate information to the public and entities seeking to determine if they are parties to a case.

The solutions that follow primarily involve information in bankruptcy cases. Access to hearings and trials where a judge presides should remain open to all as is current practice. Access to those proceedings that are not held before a judge and that constitute discovery, should continue to be closed except to applicable parties as with any civil case.

To effect long term changes to the access ability of bankruptcy documents and information, various rules and forms will need to be changed and proposed. Rule 1005 of the Federal Rules of Bankruptcy Procedure should be amended. Other rules may have to be amended or proposed. Changes to official forms will need to be made reflecting any changes to the level of access and the techniques used to accommodate the varying access levels. Forms requiring such changes would include Official Form 1, the voluntary petition, Notice of Commencement of Case and First Meeting of Creditors, Application to Pay Filing Fee in Installments and the Notice of Discharge. Other forms may need to be designed to segregate personally identifiable information.

The specific changes to all of these rules and forms will reflect choices in regards to several forms of personably identifiable information, Amendments regarding identifying numbers can be made following a choice whether the social security number or tax identification number of debtors and petition preparers should continue to be required. If it is decided to keep this information in a case, then choices must be made on whether access should be restricted to the court and the Office of the United States Trustee or to the court, Office of the United States Trustee and parties in a case. While the requirement of other personably identifiable information is not debated, a similar choice on access must be made. regarding names,, addresses and phone numbers of, respectively, debtors, 'petition preparers, attorneys and creditors before any amendments to rules and procedures can be made.

Whether identifying 'numbers continue to be required or not, supporting a choice to restrict access of the general public solely to information that is not personally identified or otherwise sensitive requires that access be limited to information necessary to evaluate the system and enough specific information to allow a person to make an initial determination that they may be involved in a case. Such information would include: case number, chapter, filing state and county, name, address and phone number of debtor's attorney, name, address and phone number of the case trustee, name of the judge, gross information on the dollar value of assets and debts, the number of creditors, the legal description of any real property and the VIN of any automobiles. Case status information and dates would also need to be provided, including dates of: case opening, discharge, conversion, dismissal and closing.

Debtor and creditor names, addresses, phone numbers, account numbers, signatures and any identifying numbers,

should be segregated either by placement on a specific page of a form, a separate form, or placement in a separate field in an electronic form and database. The ability to search using combinations of this information would need to be available for the court to uniquely identify individual debtors on demand. All pleadings subsequent to the case opening documents would be identified by case number only. Any request for docket information would provide the case number, state, county, trustee and attorney names, addresses and phone numbers and a listing of case documents. Should it be found difficult to keep debtor names off of subsequent pleadings, then the schedules and statements would probably have restricted access to protect the privacy of the sensitive information they contain.

This system would protect privacy rights of debtors and creditors while allowing the general public access to relevant information to evaluate the bankruptcy process and enough information to determine if they should individually seek increased access to a case..

Means to seek such increased access should also be developed. Filing a proof of claim will probably be enough to gain access to a case. Attachments to the claim as well as execution of the claim under a perjury and good faith clause should foreclose any misuse of this process merely to gain access to cases. A motion seeking to be added as a party in a case could also be used for this purpose or for requests by news media and academia for access to special cases such as those of movie stars or political figures,

Provision of unrestricted access to case parties requires other changes. The presence of debtor information in separate fields easily provides the means to identify pat-ties in a case through a search by a computer. Identification of parties in a case with the current combination of paper and automation is not as simple. In electronic files, a party identified by the debtor, or later admitted to a case, would need to be given a password by the court in a notice of commencement of case or another appropriate notice. That password could be unique to a case or be unique to an entity, and be linked to all cases that entity was involved in. If the password is unique to an entity, it could be a national level password or district level password. Access to a case could require entry of case number, debtor name, party name and the password provided by the court. These passwords could be time limited and could reflect access levels of court personnel, the Office of the United States Trustee, the case trustee or other types of parties.

Electronic information possessed by the courts prior to any enactment of these changes will require limited access or need to be redacted to reflect the access level of the entity seeking access. Providing several levels of access to information which is in electronic form, but in which identifying information is embedded and not in separate fields is more difficult Access to the general public may have to be denied unless the information can be redacted.

As a final long term concern, the Fair Debt Collection Practices Act requires records of bankruptcy filings be removed from credit reporting files ten years after a case is closed. It can be argued that general public access to bankruptcy records should also be ended after ten years with reopening for access upon motion for good reason or cause.

As a practical, short term solution, courts can continue to treat paper records as the official court record and provide the same level of access to these records as required by the current system of access, pursuant to 11 U.S.C. §107. Any electronic court records, which have not been "filed" with the court, then fall outside of the bankruptcy statute and rules, and the court is free to fashion its own rules of access.[264]

These rules can distinguish between the types of electronic documents and roles of requestors in a specific case. If a requestor is a party to a case, the court may provide electronic access to all information including personally identifiable information. If a requestor is a third party seeking access to a cask opening documents the court may require that a FOIA request be made for electronic access and if granted provide the information subject to removal of any excepted information. If the requestor is a third party requesting other records hdd by the court, the electronic information can be provided stripped of all personal identification.

Should any party seek more electronic information than that provided, the court can provide for a hearing, and the requestor should make a showing of a particularized need to see the electronic information, such as is required to access a Presentence Investigative Report, or the hearing can be held to take evidence that a party is a creditor and should be added to a case and provided electronic access.

264. This treatment is found in practice in many courts. The state courts of Colorado have gone farther than most and instituted rules in that regard. See Office of the State Court Adm'r v. Background Info. Serv., Inc., 994 P.2d 420 (Colo. 1999); Background Info. Serv., Inc. v. Office of the State Court Adm'r, 980 P.2d 991 (Colo. Ct. App. 1998).

Shortcomings to this short term solution arise when a court accepts electronic filings, especially of case opening documents. In these circumstances, the electronic record is the official record and 11 U.S.C. §107 applies to determine access. To alleviate the impact of this problem, parties should not present case opening documents, and the courts should also not accept case opening documents, for electronic filing. At a minimum, parties should not electronically file any pleading requiring social security and tax identification numbers and account numbers, including case opening documents, applications to pay in installments and monthly operating reports.

CONCLUSION

In summary, changes in technology are harming individuals who are drawn into the bankruptcy system through violation of their constitutional rights to privacy in sensitive, personally identifying information. The public access levels provided to information in bankruptcy exceed and are inconsistent with public access levels to similar information in other contexts. These violations of privacy rights and the inconsistencies can be ended by changing the bankruptcy code, rules and forms to better distinguish that level of access required for the purposes of the general public seeking evaluation of the system, from that of creditors seeking to participate in a case. The methods presented seek to leave intact the "practical obscurity" of the current level of access with paper records, under which the open records requirement of 11 U.S.C. 107 was enacted, in our growing electronic environment.

7-28-00
From: Wilson, Michael [mwilson@abserv.org]
To: USTPrivacyStudy
Subject: Comment

I am a bankruptcy attorney with approx. 18 years bankruptcy experience as debtor counsel. I am currently employed by a private corporation engaged in bankruptcy related services. Part of my responsibility is the gathering of bankruptcy data for evaluation purposes. The lack of an organized central depository for this information has been very frustrating. However, as debtor counsel, I am concerned about the availability of personal debtor data. The best advise to debtors appears to be to start all new accounts after filing the petition. Of course, you can't change your SS#.

It is important to make general debtor data available without specifically identifying debtors. This is normally done by researchers by assigning confidential numbers to files. Before case files could be closed to public inspection, the clerks offices would need to scan or enter non-identifying data into its pacer or similar system as each case is filed. After electronic filing of all pleadings has been implemented, this could be done automatically by the software. Access to the actual case file could then be restricted to trustees, attorneys of record, & people who show adequate cause. Trustees should be subject to the same restrictions as the clerks office.

The sale of customer lists would appear to be acceptable if the information was not submitted with an expectation of privacy, or if the purchaser is engaged in a similar occupation and would be bound by the same confidentiality policy. However, if your selling a list of birth control customers to the catholic church, then I think this type of unrelated sale should be restricted or prohibited. Thank you for the opportunity to comment.

Barnhill, Leander

From: Cordry, Karen [KCordry@NAAG.ORG]
Sent: Thursday, September 28, 2000 4:33 PM
To: USTPrivacyStudy
Subject: Bankruptcy Privacy Comments

Attached are several documents with respect to the Bankruptcy Privacy Study. In conversations with Joseph Guzinski, he authorized an additional extension of time to file these comments. I have had to break our filing up into several emails because of the size limitation of your system.

The first email has a cover letter signed by 20 Attorneys General, and the comments themselves.

The second email has the two Adobe Files referenced in the comments.

The third emails has the objections of 47 Attorneys General and of New York in the Toysmart case. Finally, because I only have the material in faxed form, I will send by hard copy the objections of the State of Texas. Please advise if you are missing any of these materials.

Karen Cordry, NAAG Bankruptcy Counsel
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STATE ATTORNEYS GENERAL

A Communication From the Chief Legal Officers
of the Following States:

California • Idaho • Iowa • Kansas • Maryland • Massachusetts • Michigan
Mississippi • Missouri • New Jersey • New York • Oklahoma • Oregon • Pennsylvania
South Carolina • Tennessee • Utah •Virgin Islands • Washington • West Virginia

September 28, 2000

RE: Comments on Privacy Issues in Bankruptcy Study

Leander Barnhill,
Office of General Counsel
Executive Office for United States Trustees
901 E Street, N.W., Suite 780
Washington, DC 20530

Dear Sir:

Attached are comments of the undersigned Attorneys General with respect to the study on the effect of bankruptcy filings on the privacy interests of individual consumer debtors currently being conducted by the Departments of Justice and Treasury, the Office of Management and Budget, and the Administrative Office of the U.S. Courts. We are submitting them today, in accordance with the discussions with Mr. Guzinski last week in which he authorized an additional extension of time for submission of the comments until today. In light of the early stage of the study, our comments are necessarily general and serve more to point up areas for consideration than to make definitive recommendations. However, we applaud this effort and look forward to working further with those offices as they refine their analysis and begin to make concrete suggestions.

A facilitation service provided by the National Association of Attorneys General

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Our comments are meant to reflect the multitude of roles that the states play in bankruptcy cases. In many cases, they are true creditors, seeking recovery for taxes, student loans, and the like. In other cases, they exercise police and regulatory authority to enforce environmental laws, remedy consumer protection and antitrust violations and similar issues, whether or not monetary claims are involved. In both of these roles, states often need detailed information about the debtor and the case. In addition, though, they also stand in a *parens patriae* role to their citizens and are equally concerned with their privacy rights, when they are forced to file for bankruptcy. The amount and availability of information that is made publicly available in a bankruptcy case clearly raise issues about the potential for criminal misuse, and concerns about the use of such data for commercial purposes without the consent of the debtor. While filing bankruptcy and receiving the financial relief that it offers will inevitably result in some loss of personal privacy, the laws should strive to reduce that loss to the greatest he extent compatible with the other goals of the system. Our initial comments are an effort to illuminate some of the competing interests that must be reconciled and to suggest a few possible ways to resolve some of the problems. Further information about the study and requests for additional input should be directed to Karen Cordry, NAAG Bankruptcy Counsel, who will continue to coordinate the states' response in this area.

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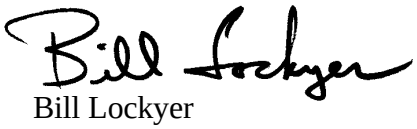

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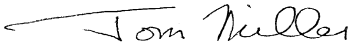

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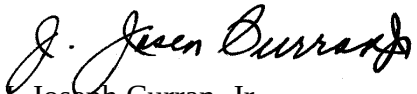

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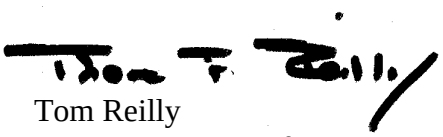

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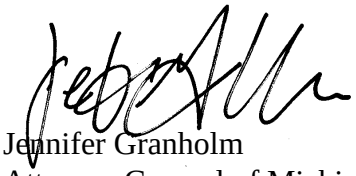

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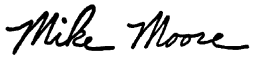

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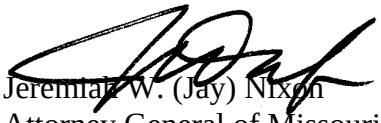

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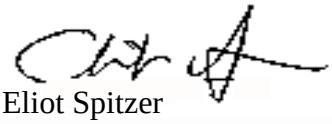

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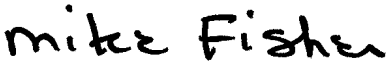

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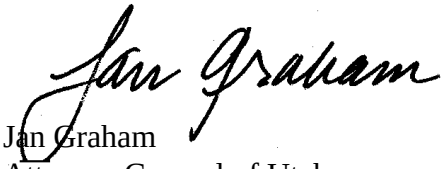

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Privacy Comments
Executive Summary

Bankruptcy provides a uniquely difficult forum for those concerned about privacy issues. It affects more persons than any other form of federal litigation. It requires those seeking relief under its provisions to divulge large amounts of highly detailed financial and personal information and to make that data generally available to the public. While other legal and administrative proceedings (such as divorce actions and applications for public benefits) may require disclosure to the government of similar information, they do not generally allow or assume that there will be the same level of public access to such information, with the concomitant loss of personal privacy.

In addition, the ready availability of such information, particularly when it may be easily obtained and copied from electronic filings that can be accessed from the Internet, greatly increase the concerns about the uses to which the data might be put. The potential for the criminal misuse of such information for identity theft and related crimes and by stalkers and other persons seeking to cause injury is clearly present. The ability to obtain large amounts of information at low cost makes the use of bankruptcy data for commercial purposes economically feasible in ways that were not possible when the data had to be hand-gathered in person from individual clerks' offices. Unsolicited commercial offers to debtors may be viewed as intrusive and burdensome; moreover, even if debtors may opt out of having their information released to third parties, many question whether it is appropriate to facilitate efforts to solicit them to immediately take on new debt.

While these concerns support the adoption of additional privacy restrictions, it is equally clear that there are many reasons why keeping the information in bankruptcy filings open to the public is also important. The bankruptcy process allows debtors to eliminate large amounts of debt, while operating based primarily on self-reporting by debtors, with the information being made widely available to other parties who are expected to challenge any misstatements by the debtor. The trustee in a Chapter 7 case, in particular, has only a very limited ability to investigate debtor statements absent some indications of problems being raised by other parties in the case. If detailed information were to be limited to the trustee, it would likely require a far more expensive and intrusive investigative process by the trustee to ensure that the system is not subject to rampant fraud. Moreover, creditors, those seeking to do business with the debtor in the future and government regulators all need access to information to decide their course of action.

Thus, any treatment of privacy issues must balance a great many competing interests. There are at least some measures that can be utilized to restrict release of data that is particularly susceptible to misuse. These efforts will be more effective as true electronic filing becomes more common, but will require substantial advance planning of the Official Forms to accommodate a variable disclosure of information. Other measures may include determinations of appropriate uses for information, requirements that parties certify that their use meets those requirements, and penalties for misuse. At a minimum, debtors should be given the right to determine whether commercial use is made of their information. Consideration also needs to be given to assuring that bankruptcy is not used as a means of allowing the debtor to sell

information that it obtained in confidence from those doing business with it.

Privacy Comments

I. Introduction and Background

The concern over privacy issues in bankruptcy parallels the growing debate over such issues in society as a whole. The reasons for the increased concern are much the same – technological advances on the information gathering and dissemination side of personal and commercial activities have not been matched by similar uses of technology to allow consumers to maintain a degree of privacy and control over the use of their information. Simply asserting that no more information is now being gathered or being made available than in the past is not an adequate answer. Placing such information on the Internet in electronic form means that it has become exponentially easier to capture and combine such data and to use it for purposes both benign and malignant. And, in doing so, it has raised warning flags about issues that have been too easily ignored in the past, when the issues were less visible.

The reality is that, by use of computerized analysis, it becomes economically feasible to combine many separate sources of data and to build up a frighteningly complete pattern of a person's life, habits, and beliefs.[1/] Even while software is emerging to try to block surreptitious information gathering requests, business is feverishly engaged in trying to gain as much information as possible about those with whom it comes in contact.[2/] Some of those information gathering methods are open and obvious; others are less overt, and involve correlating information about consumers from many sources that they have no idea will be available to third parties. Viewed benignly, these efforts are merely an attempt to personalize the experience and to provide better service. Viewed with suspicion, they can be seen as an effort to commercialize everything about one's personal life, and provide many potential avenues of abuse.[3/]

The concern over these issues is exacerbated by the changing nature of modern life. People see themselves as part of an ever-larger world over which they have decreasing

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[1/] See the attached advertisement from the July 2000 PC Magazine. [In Adobe file.]

[2/] Compare the attached articles from the July 2000 PC Magazine, which, on the one hand, extol privacy and and, on the other, give advice about how companies should gather and compile date on their customers. [In Adobe file.]

[3/] Use of computer scanning cards to provide grocery store discounts, for instance, seems innocuous, but potential abuses of this detailed information about one's purchases can be easily imagined. Within recent years, there was an outcry about the use and sale of information from store pharmacy records to an outside company which used the data to send customers letters containing both additional medical information and sales pitches about related products. Plainly, the information obtained from a store card could be used in the same way – manufacturers of baby products might like to buy the names of everyone who purchases a home pregnancy test. A store that is sued by a consumer who falls on the premises could seek to introduce its records of his alcohol purchases to show that he might have been impaired at the time. Examples are endless.

knowledge, input, and control. The natural reaction is a desire to limit access to private information in order to retain some residual degree of control and influence. Having one's personal life be an open book to one's neighbors in a small community, where one knows those neighbors and what use they would make of the information, is one thing. When one's life is equally exposed to the world at large with its less predictable population, that prospect becomes a great deal more threatening.

II. Goals and Concerns

Before one can structure a privacy policy, it is necessary to know why such a thing is desirable. There are several bases for imposing privacy constraints and each dictates different types of actions. Some of these may be of particular concern with respect to the population of bankruptcy filers. As a group, such persons tend to have lower income levels than the population as a whole; less financial sophistication; and perhaps a greater susceptibility to the unwise use of credit. Thus, bankruptcy filers may represent a group disproportionately likely to be open to aggressive, abusive, or fraudulent solicitation tactics, and deserving of special protection.

A. Identity Theft and Other Criminal Misuse

Identity theft is becoming the signature crime of the '90's and the decade beyond. According to research conducted by the Federal Trade Commission, identity theft is on the rise. A toll-free FTC hotline established to take identity theft calls is logging 400 calls a week, and it is anticipated that call volume will eventually grow to 200,000 a year. Available statistics confirm the rise of identity theft. Consumer inquiries to the Trans Union credit bureau's Fraud Victim Assistance Department increased from 35,235 in 1992 to 522,922 in 1997. In addition, the Social Security Administration's Office of the Inspector General conducted 1153 social security number misuse investigations in 1997 compared with 305 in 1996. In 1999, the telephone hotline established by the Social Security Administration Inspector General received reports of almost 39,000 incidents of misuse of Social Security numbers.[4/]

In the fall of 1998, Congress passed the Identity Theft and Assumption Deterrence Act. This legislation created a new offense of identity theft, which is triggered by anyone who

> knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law. 18 U.S.C. § 1028(a)(7).

In most cases, this offense carries a maximum term of 15 years imprisonment, a fine, and criminal forfeiture of any personal property used or intended to be used to commit the offense.

[4/] Testimony of Jodie Bernstein, Director of the Federal Trade Commission's Bureau of Consumer Protection before the Senate Judiciary Committee Subcommittee on Technology, Terrorism, and Government Information on March 7, 2000.

In addition, the majority of states have passed laws related to identity theft, and others may be considering identity theft legislation. Where specified identity theft laws do not exist, the practices may be prohibited under other laws. Prevention, through responsible information-handling and privacy practices, is generally deemed to be the most effective method of limiting the growth of identify theft. Thus, to the extent compatible with other needs for the information, access to private information should be limited to deal with this issue. Other criminal activity, as well, such as attacks by stalkers has been traced to the public availability of information.[5/] This concern led to the passage of the Drivers Privacy Protection Act, which regulated the disclosure and resale of information from state Departments of Motor Vehicles (DMVs) and private parties, without the driver's consent.[6/] Other similar state laws have passed since then.

Stolen information can also be used in a number of other ways – undocumented workers, for instance, often obtain false documentation under the name of a real person. Deductions for that worker then will actually go into and be credited to the account of the true holder of the Social Security number. This can lead to serious problems with the IRS and other government agencies for the account holder with respect to the earnings that they know nothing of and have not reported on their tax returns or other documents. Stolen identity documents are also an increasing problem for police, who find that many persons being arrested present identification in the name of another party. The potential for serious harm to the person whose identity has been taken is obvious. Finally, such numbers may also be used to assist in bankruptcy fraud, especially with respect to real estate. By using false Social Security numbers, and other personal data, parties have been able to continually file petitions to repeatedly forestall the effective completion of foreclosure actions with respect to a given piece of property.

A final point of particular concern is the need for special protections for those who face special dangers, such as women facing abusive spouses. Such persons may have protective

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[5/] See, e.g., remarks of Rep. James P. Moran, in discussing H.R. 3365, the Driver Privacy Protection Act, that he introduced in 1993. 139 Cong. Rec. E2747 (Nov. 3. 1993). This bill was eventually included in the Crime Control Act of 1994, P.L. 103-322.

[6/] The Act was carefully tailored to restrict personal information while allowing release of necessary information for proper purposes. For instance, personal information is defined to include identifying information, such as a name or address (but not a zip code), and medical information – but not information on accidents or driving violations. The bill originally relied on consumer"opt-out,"but was changed to an "opt-in" basis in October 1999. Certain disclosures, on the other hand, are required, such as for use in connection with recalls. The Act also regulates the resale and disclosure of information that private parties have obtained from the DMVs. If the information was obtained for a permissible purpose, it may be redisclosed for any such purpose. If the information was obtained for direct-marketing purposes (with respect to those persons who had authorized such disclosure) it can be resold for other direct-marketing uses. Parties receiving the information must maintain records of the basis for the disclosure and the subsequent uses of the information. Penalties are provided for knowingly obtaining a record for an impermissible purpose or making false representations. See, generally, the discussion of the Act in *Reno v. Condon*, ___ U.S. ___, 120 S.Ct. 66 (Jan. 12, 2000) for a more detailed description of the Act.

orders against their husbands and be living in shelters, which will not disclose their presence to *anyone* in order to avoid the possibility of the women being found and subjected to assault or murder. Yet, the disruption caused by the physical abuse is likely to result in economic difficulties that may necessitate a bankruptcy filing in order to allow the woman to obtain a truly fresh start. A normal bankruptcy petition, however, provides exactly the same information that she is desperately seeking to conceal. Similarly, a stalker might well be able to obtain detailed information about a person with whom he or she is obsessed. Thus, whatever judgments are made about what data must be providing in the petition, consideration should also be given to deciding whether all of the personal information that is supplied needs to be available to the public. And, even where it will normally be public information, there should also be some process by which a debtor may request special treatment and concealment of one or more categories of information from anyone but the trustee and the court unless and until a party establishes a proper "need to know" the information.

B. General Desire to Preclude Disclosure of "Personal" Information.

Even if information is not misused criminally, most people are unwilling to have many types of personal information generally known. This may be based on a concern that some types of data are socially stigmatizing (i.e., medical issues such as AIDS or unwed pregnancy). In other instances, societal norms dictate that some types of information are not made generally known, even if they are not stigmatizing – most information about personal income and expenses falls in this category. Moreover, the lack of knowledge and control over who has access to such information is itself a demoralizing and disconcerting experience for most people. In a crowded world, a zone of privacy even about relatively trivial matters is felt necessary by most people.

However, while this is generally a highly significant priority in nonbankruptcy cases, it must take a somewhat lesser place in bankruptcy cases, precisely because the debtor has placed these matters at issue by filing the petition. Presumably nothing that is being asked for in the petition or the schedules is irrelevant to the relief being sought by the debtor. If it is, the court should not be asking for it at all. But if its relevant, then it becomes much more difficult to justify barring general access to the data, for this reason, than it would be if no petition had been filed. Thus, in the bankruptcy context, the decision as to which data should be available and which remain confidential will likely be based more on issues regarding criminal misuse or commercial transactions than on this one.

C. Commercialization of Information

The commercial use of information raises separate issues yet again regardless of whether the particular information is considered highly sensitive and even if the use of the information is wholly legal. Commercial solicitations based on a personal, unpublicized activity that one is involved in are likely to prove startling and are often unwelcome. Depending on the method of the solicitation (with telemarketing undoubtedly being most problematic), a sales contact may be viewed as unwanted, intrusive, and burdensome by many recipients. Moreover, the ability of third parties to use one's information for personal gain without compensation to the person providing the information can be seen as a form of unfair exploitation. In addition, to the extent

that the bankrupt population is deemed to be disproportionately susceptible to deceptive or unfair advertising, the ready availability of information for commercial solicitations may exacerbate those problems. A particular problem is that the offers made to debtors are often highly onerous, and likely to provide little or no benefit, while increasing the danger that they will once again incur excessive debt. Credit card offers, for instance, may have limits of only a few hundred dollars, while requiring payment of one to two hundred dollars in upfront fees that are promptly charged against the credit limits. When coupled with the high interest rates on the cards, and large late fees, the debtor may quickly find that he has little or no credit to show and several hundred dollars of new debt. Encouragement of such transactions are not in the interests of those trying to reduce the number of new bankruptcy filings.

III. General Privacy Policy Principles.

Typically, privacy policies focus on the following issues, and guidelines:

A. Collection Limitation: Data collected should be limited to that necessary for the purpose, should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

B. Purpose Specification: The purposes for which personal data are collected should be specified before collection and any subsequent use or disclosure for other purposes should be specified to the data subject in advance.

C. Use Limitation: Personal data should not be disclosed or made available except as set forth in the "purpose specification" except: (a) by consent; or (b) by the authority of law.

D Security Safeguards: Personal data should be protected from misuse by security measures that protect it from unauthorized access by third parties.

E. Openness: Means should be readily available for the data subject to learn of the existence and nature of data being obtained and used, and the identity of the data controller. The data subject should have the right to confirm whether data is being retained and to have access to that data in a reasonable time at reasonable cost, to challenge any denial of access, and to have inaccurate data corrected.

F. Accountability: Data controllers should be accountable for compliance with the measures, and penalties should be provided for noncompliance.

Many of these principles are embodied in other federal laws, such as the Privacy Act, 5 U.S.C. 552(a), which require federal agencies to provide much of this information in advance to persons from whom they collect data. The court systems, to date, though, do not function in that mode, at least with respect to case documents. However, in light of the resemblance of bankruptcy cases, and the information required therein, to other forms of government action that provide financial benefits upon a showing of need, it is appropriate to consider whether more attention should be

paid to implementing some or all of these principles to the extent compatible with the other needs of the bankruptcy system. Section 107 of the Code does provide notice that all filed documents are part of the public record, but individual debtors are unlikely to know of that section of the law. Conversely, the section provides for protective orders with respect to trade secrets and "scandalous or defamatory" material, but neither of those sections would cover the case of the abused spouse discussed above.

IV. The Bankruptcy Framework

Bankruptcy cases are, by their very nature, probably the single richest source of economic and personal information – with the concomitant potential for abuse – of any form of litigation. The sheer number of bankruptcy cases (approximately 1.25 million in the last year), the holding of data in only about 100 court clerk's offices, and the ever-increasing use of electronic filing and electronic record-keeping in bankruptcy courts, including the practice of "imaging" paper documents that are filed and making those images available to the public on the Internet, makes these files an incredibly valuable and accessible source of information for many parties. It is clear that there are enormous demands for this data, both on an individual basis in a specific case, and on a collective basis, for both commercial and noncommercial purposes. Thus, this is clearly a legitimate area for concern for those dealing with privacy issues.

On the other hand, it must also be remembered that, in general, individuals choose to file bankruptcy, albeit economic pressures may make the choice seem inevitable to a financially struggling debtor.[7/] In addition, the grant of a bankruptcy discharge does provide substantial relief to those receiving it, often with little or no compensating return to their creditors. In this regard, about two-thirds of all bankruptcy cases are filed in Chapter 7. Of those cases, about 95% are deemed to be "no-asset" cases; i.e., the debtor has nothing to distribute to creditors after taking into account the allowed exemptions under state and federal law. Chapter 13 cases do provide larger returns to creditors, but most of the total amount distributed ($2.9 billion over the 12 months ending on September 30, 1998, for instance) goes to ongoing payments to secured creditors to allow the debtor to retain assets such as a car or a home. Much of that amount could likely be collected in any event by the creditor in a foreclosure or repossession. Thus, the amount paid to unsecured creditors is the truer measure of how much additional value is provided in the bankruptcy – and returns there vary widely. The highest five states return, on average, between $2,900 and $4,600 per case to unsecured creditors, while the lowest five returned only $443 to $919 per case.[8/] The discharge, on the other hand, typically may eliminate tens and even hundreds of thousands of dollars in debt for an individual debtor.

[7/] Individuals can be made the subject of involuntary petitions in Chapter 7 or 11, but these are a very small portion of the total case loads. Chapter 13 cases are purely voluntary.

[8/] Chapter 13 statistics are taken from "Measuring Projected Performance in Chapter 13: Comparisons Across the States" from the July/August 2000 issue of the *American Bankruptcy Institute Journal*, p. 22. Relative percentages of Chapter 7 and 13 cases are taken from the website of the Administrative Office of the U.S. Courts, www.uscourts.gov.

Obviously, the chance to receive such a benefit can be tempting and is an opportunity for fraud. While the great majority of bankruptcy filers fit the classic definition of "poor but honest," at least some do see a chance to take advantage of the system. The sheer volume of cases makes it economically difficult or impossible for any existing official, such as the case trustee, under the current fee structure, to thoroughly investigate a debtor's financial situation to determine whether a filing is justified or what assets are available to pay claims.[9] Instead, the system is based on self-reporting of data by the debtor, which is then made publicly available, so that interested parties may easily obtain the information and challenge the debtor's statements by filing additional or contradictory data with the trustee. It is a given that this process still allows a substantial amount of fraud and deception to slip through the system, but it would be difficult to devise an economically feasible process that would root out more of the fraud without unduly increasing the costs and burdens on the great bulk of honest filers and on society as a whole. A good discussion of these issues is contained in In re Barman (Taunt v. Barman), 252 B.R. 403 (Bankr. E.D. Mich. 2000), where the court discussed the Fourth Amendment ramifications of a trustee's request for an order allowing him to search the debtor's premises for concealed assets.

At minimum, then, in order to preserve the integrity of the system and to administer the elaborate set of policy choices that have been made by the Bankruptcy Code and state law, as to which debts should be paid, which should be discharged, and which should be retained, it is necessary to obtain a great deal of information from debtors for review by other parties in the case. Governmental entities, in particular, are often involuntary creditors, with respect to, for instance, tax claims, or environmental remediation costs. As such, they typically must initially rely on self-reporting by the debtor in order to determine if they even hold a claim and, if so, in what amount. Moreover, all parties in the case must decide what actions to take based on an analysis of the debtor's total economic situation. For instance, should objections be filed because the debtor's total liabilities exceed the Chapter 13 limits? Conversely, does the debtor's economic situation suggest that the Chapter 7 filing is a substantial abuse? Are the debtor's assets large enough that it is worth investing time and resources in the case? Is there a potential for recovery of preferential or fraudulent transfers that might provide a substantial recovery to the estate? The list is endless, and plainly requires that parties have access, and be able to challenge, a substantial amount of detailed data.

In addition to the specific uses of the information in particular cases, there is a constant push for more information in the aggregate to help policy makers in making choices about how to structure the Code. What are the debt levels of those filing in Chapter 7 versus 13? How much money do creditors receive in the different Chapters? How do completion rates for Chapter 13 plans vary between different districts, and what are the factors that affect the differences? Do the

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[9] Debtors currently must pay only $200 to file in Chapter 7 or 13. In turn, trustees in Chapter 7 cases are only guaranteed a minimum of $60 per case for routine filings (11 U.S.C. 330(b)). Those amounts clearly only suffice to allow a bare minimum of review to be made by the trustee of routine filings. An in-depth investigation by the trustee, sufficient to validate the truth of the statements made by a debtor would obviously require far greater expenditures by the trustee and a far greater filing fee to be imposed on the debtor.

differences arise from the nature of the debtors and their liabilities, or the characteristics of those administering the program? Each such question requires a large amount of data from many files and the ability to make many correlations and cross-comparisons. To the extent that aggregate data is used, it presents fewer privacy issues, but concerns may still arise.

Moreover, it is necessary to make much individualized information widely available – both to the persons that the debtors schedule as creditors and to those *not* scheduled. There are numerous reasons why a party with a valid claim under the Code will not be listed by the debtor. To begin with, the Code's definition of a claim is extraordinarily broad. Many debtors will not, in good faith, appreciate how many potential liabilities may be covered by that definition and may inadvertently fail to list a party that the Code will treat as a creditor. Other debts may simply have been forgotten by the debtor, or the debtor may think the creditor has written off or forgiven the debt, if there has not been recent collection activity. In other instances, the debtor may have no reason to know of the debt – a business that makes defective products will often not know that there has been an injury until a suit is filed months or years later. Similarly, the government may be carrying on a confidential investigation of the debtor, or auditing old tax returns. In both cases, the debtor may not even know of the potential liability when it files its schedules, yet all of these parties are proper claimants and need to have the same access to information as those whom the debtor has acknowledged.

In addition to these legitimate reasons for omission of a creditor, there may be improper reasons as well. An ex-spouse in an acrimonious relationship may choose not to notify the former partner in order to inconvenience him or her and make it more difficult to collect payments owed under a divorce decree. A party engaged in fraud or other violations of the law may choose not to notify his victims or the government. A debtor seeking to conceal assets or to assert an improper exemption may decide to avoid notifying those who would know the true facts so that they cannot appear and challenge his statements. Some of these tactics may work, and some may not in the long run, but their appeal to the unscrupulous is obvious. Finally, sometimes neither the debtor nor the creditor may know of an actual problem (such as undiscovered contamination of a piece of property), but the notice of a bankruptcy, and its deadlines and finality, may trigger an investigation that uncovers the problem.

In all of these situations, if the only parties who are entitled to access case information are those listed in the debtor's schedules, as some proposals suggest, this will work a serious injustice on unlisted parties who still do have claims under the Code and who need to be able to assert their rights in the matter. Yet, to open the data widely in order to ensure that omitted creditors have their rightful access, makes it difficult to deny access to the general public, thus raising again the problems that occur with unlimited availability of data.

In addition, another major current use of bankruptcy data is for noncreditor parties making decisions about whether or not to deal with the debtor in the future, either by extending credit, by offering employment, by renting an apartment, and the like. The fact of a bankruptcy, the reasons for the filing, the extent of the relief the debtor will obtain, and many other similar factors can be of great importance to those parties. They may seek the information directly; conversely, they may look to reporting of bankruptcy filings by credit bureaus, who obtain and

disseminate the information on a commercial basis. Currently, there is no bar on either users or credit bureaus obtaining any public information in the case files. Proposals that would limit information dissemination to existing creditors would severely impede or eliminate access by this group of interested persons. Yet, it is common practice in today's society for many types of financial information to be gathered by credit bureaus, and the Fair Credit Reporting Act already has detailed procedures on who may then access such information and for what purposes. That Act probably provides a reasonable model for the bankruptcy system and the information that is available there.

Governmental regulators, as well, may have concerns with respect to a debtor that do not constitute a "claim," within the meaning of the Code. A proceeding to revoke a license for noncompliance with safety regulations, for instance, would not be a "claim," but the government would obviously have many reasons to wish to know of the bankruptcy filing and to be able to obtain details about the debtor's affairs. Again, focusing solely on the interests of "creditors" would ignore these additional concerns and needs for the information produced in the case.

The one certainty that can be seen from these conflicting imperatives is that it is unlikely that any policy can be set that makes judgments based on sweeping generalizations. Rather, it is likely that accommodations will need to be made in many areas by a close analysis of the specific types of data, the reasons why different parties need to know specific items of data, the potential harms from providing or denying access, and the possibility of structuring different levels of access depending on the party making the request, the need for the information, and the consent of the debtor. While many of these matters will require more effort than simply deciding to open or close all files, the value of technology advances is that much may be done at a reasonable cost if there is sufficient advance planning and structuring of the means by which data is gathered and disseminated.

In deciding how to treat certain data, the emphasis should be on making the system self-executing to the extent possible. Thus, if information is to be made generally available, the party seeking to view it should not have to undertake burdensome efforts to receive permission to see it. At most, there should be a certification process with penalties for false statements as to the party's reasons for obtaining the data and proposed uses for it. Nor should we too readily try to impose additional requirements on who can obtain access to the information and what steps they have to take to do so. With the sheer size and complexity of the bankruptcy system, it will be difficult to find any party, whether it be the debtor, the court clerk, or the case trustee, who will be able to devote substantial additional time to enforcing an unwieldy privacy policy.

V. Application of Principles

A. Specific Types of Information – Particular Concerns

1. Social Security numbers.

Debtors should not give up all privacy when filing bankruptcy and if anything should be protected it is the Social Security number, because it is the key to most identity fraud schemes.

Yet, precisely because the Social Security number is such a crucial and ubiquitous identifier, it is probably unavoidable for now to continue to make that information available to those concerned with a particular case. The Social Security number is the only unique identifier that can be used to connect information about the debtor across the board. Many systems that are designed to detect fraud work by cross-checking various forms of records by social security numbers.[10/] One issue that is unclear is how the required use of the number in the bankruptcy context comports with the limitations placed on its use by the Social Security Act. Because of its unique importance, protections for this piece of information will probably have to largely revolve around providing sanctions for its misuse.

2. Account data – credit cards, bank accounts, insurance policies, etc.

This deals with credit cards, bank accounts, insurance policies, and other assets where an account number has been assigned by a creditor to identify the debtor. Unlike the Social Security number, these are usually unique to a given creditor and, hence, absent unusual circumstances, there would seem to be little need for this to be provided to anyone, other than the named creditor. One relatively simple way of accomplishing this would be for the debtor to use its own mailing matrix that lists the account number with the creditor's address, but to provide a matrix to the court that does not have the account numbers. At most, it seems likely that creditors generally only need to know the name of the other creditors and the amount owed, or in the case of bank accounts or other assets, the name of the institution holding the asset, the type of account and the amount. If more specific information is needed, in a particular instance, the discovery provisions in the Rules or in state and federal law should be sufficient to allow an entity to demand a specific account number or more details about the account, if warranted. Inasmuch as that process allows for objections and protective orders, it should be sufficient The trustee should be able to see all the information provided by the debtor.

3. Tangible Asset Data

This could be a basis for criminal misuse to the extent that it provides detailed information about exactly where one may locate specific assets. On the other hand, since the great bulk of debtors have few assets of significant value, this is not likely to present much of a target of opportunity. On the other hand, it is precisely the type of information that individuals may not wish to make generally known. However, absent a far more intrusive and expensive system of investigating and administering assets, it is difficult to conceive of how one can avoid making this information generally available – indeed, even to those who have no role to play in the case except to report fraud by their neighbors. The system operates in large part on the honor system, supplemented by the informed judgment and intuition of the case trustee, and the input of

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[10/] Reports of interest paid by banks, for instance, are cross-checked against reported interest on tax forms. Wage withholding statements are cross-checked against records of those drawing unemployment compensation, and the like. The Social Security number is a unique identifier that assures that similarly-named persons will not be mistakenly treated as having engaged in fraud.

interested persons. The mere possibility that false statements will be reported is itself a powerful deterrent to making such statements to begin with. Without access to the data, the existing levels of fraud in the system are likely to explode.

4. Employer name; wages, commissions, benefits. Expense Information

While the first three types of data are more likely to be the subject of criminal misuse, these types of information tend to be more personally significant to the debtor rather than being likely to result in abuse. As such, they do not provide the same elevated need for protection. Conversely, the information is of obvious relevance in the case, particularly with respect to the dollar amounts earned, and the amount and type of expenditures made. Although one might argue that not everyone needs this information, it is difficult to state how the line should be drawn or to see this as a major issue of privacy concern, in light of the relief being sought.

5. Personal Data – address, former names, etc.

This information is generally not personally stigmatizing. However, it can provide corroborating information for identity theft purposes, and in certain cases, as noted above, it may prove problematic for specific debtors by providing data that may assist abusive parties and stalkers. As with much of the other data, the former issue is probably unavoidable. The latter problem, though, is one that should be left for treatment by case specific protective orders. It is not clear that there is any current provision in the Bankruptcy Rules for imposing such limitations, but the concept is not overly difficult. Any such rule should address how an order could be sought, who could see the records nevertheless (such as bona fide governmental entities), how it would be decided what information would be concealed, how a decision should be made to release the information and whether the debtor would be informed in advance of such a decision.

6. Trustee Nonpublic Chapter 13 Information

Issues with respect to the use of this data primarily relate to questions regarding the commercial use of the data. There is little reason for parties other than commercial entities to have any particular interest in the minutiae of the Trustee's receipt of and disbursement of payments, or the debtor's postpetition expenses. (Creditors may wish to check on information that relates specifically to their own claims, but that sort of request is not likely to raise any serious privacy issues). Credit bureaus, credit card issuers, and similar entities, on the other hand, will likely have substantial interest in looking at this data, for much the same reasons as they look at other consumer information – it provides a picture of the person's ongoing financial activities and a basis to gauge whether or not new credit should be provided. Thus, the decision on this issue will largely turn on one's view as to whether data should be released for commercial purposes and under what circumstances.

B. Commercialization Issues

Data obtained from bankruptcy records may relate, as noted above, to a variety of ongoing commercial transactions. The primary concern, however, arises from the assumption that credit card companies and other businesses will use bankruptcy lists and the information derived therefrom as a basis to solicit borrowers for additional credit. This is an area where the increased availability of information in electronic form really does make a difference. Most of the other parties who may seek information in a case will have no reason to look beyond a particular debtor, and providing information on the Internet versus through a personal visit to a clerk's office will not result in their seeking any additional or different information about other persons. The ability to "mine" electronic data through the Internet, though, is the essence of many business plans and likely to be used in ways that would not happen through access to paper court files, where it would be far more costly and burdensome to obtain the information and convert it to a commercially usable electronic format.

Under some circumstances, this can be a beneficial process for debtors and creditors alike. Many involved in the bankruptcy process believe, for instance, that the appeal of Chapter 13 can be increased by providing for better and faster rehabilitation of credit for those making a good faith effort to pay their debts. Many debtors who are interested in seeking renewed access to credit may well appreciate the chance to receive such offers. (This is particularly true where a bankruptcy filing results from circumstances beyond the debtor's control, such as job loss or illness, rather than due to financial mismanagement.) Others will not. Companies wishing to make such credit offers will obviously want to look at the most recent and detailed information available about the debtor in order to make targeted appeals and to tailor the offer and the terms to the repayment effort being made by the debtor. This would likely make them prime users of trustee and other bankruptcy data.

On the other hand, offering new credit and soliciting debtors to make new consumer purchases immediately upon their filing bankruptcy or receiving a discharge is viewed with great concern by many. They argue that offering new credit to those who have just filed bankruptcy – often because of excessive credit use, even if other factors are present – is akin to offering a drink to an alcoholic. Even if filers are not vulnerable to further overspending, they may not wish to be burdened with an onslaught of offers from everyone who can compile a list of names and addresses from bankruptcy records. The use of the data could be positively harmful if it were obtained by those who wish to make fraudulent offers to a population who might be viewed as more likely to succumb to deception. Even those Chapter 13 programs that have offered credit rehabilitation have normally coupled it with a debtor education program about responsible credit use and avoiding fraud. Absent such programs, those opposed to commercial solicitations argue, debtors are likely to quickly end up in financial difficulties again if subject to unlimited solicitations for new credit.

There are basically two approaches to this issue, both of which require that users be required to specify the purposes of their request, so that commercial uses can be treated separately. To the extent that information is concededly to be used for general commercial purposes (i.e., unrelated to the particular case filing), regulations could either opt for the debtor consent mode or the restricted use mode. The former would provide, as in the Driver's Privacy Protection Act, for a debtor option as to whether their information could be released to parties

seeking to use it for commercial purposes. (An opt-in method would be the preferred way of implementing such a system.) Under this approach, it would be solely up to the debtor to choose whether to receive such information and whether to take advantage of any offers that are made. The other alternative would be based on the notion that such approaches are too likely to result in harm to debtors, and that they should be barred altogether or severely limited. To be workable, such a bar might have to preclude *any* solicitations or limit the terms of solicitations for a period of time after a bankruptcy filing and/or discharge since credit companies already have information from their own files as to a large percentage of bankruptcy filers and could not be precluded from making offers to them based on such information. Thus, a simple ban on obtaining bankruptcy information to make new offers of credit would only mean that debtors would be precluded from obtaining competing offers, leaving them as a captive market for their current card issuer.

C. Methods of Protecting Information

Under the present system there is no practical way to provide information to certain parties but preclude others from seeing it. The only control on access to date has been the inconvenience of visiting the court house. That, in our view, is an inappropriate way of deciding these issues. It simply means that large entities that appear frequently will be able to readily obtain data and better protect their interests, while smaller parties or those who do not reside in the city where the courts are located will be handicapped. If information is to be made publicly available, then it should be made equally available to all.

That said, it means that there will need to be more attention paid to mechanical means of filtering data. To the extent, the courts move over the next few years to total electronic filing and petitions, the solution can be left to relatively simply programming. Fields in the petition, such as account numbers, can be set to be hidden unless particular criteria are satisfied. One such criteria could be that the party is a creditor with a Personal Identification Number (PIN) that matches the name specified on the petition. Or, it could be that one is required to check, on an electronic form, the party's relationship, if any, to the debtor and the reason data is being sought. Depending on the reason, more or less information may then be made available. Clear penalties should be defined for obtaining information for an improper purpose or for a purpose other than that specified.

Before we reach that stage, though, and while much of the data on the Internet merely consists of scanned in pages, a different solution may be necessary. One possibility would be to have multi-part forms, where certain blocks are blacked-out on the copies, and only the trustee obtains the full information from the top copy of the form. Parties seeking data beyond that provided on the redacted copy may need to submit a request detailing the reasons the information is needed and agreeing to comply with the requirements to the trustee to be granted access (i.e., by a PIN) to the full copy of the record. This will obviously be more time-consuming than the current situation and may require some adjustment to trustee compensation to make up for the time spent dealing with these requests.

Any solution will have to take into account that there will likely continue to be large

numbers of hand-written *pro se* petitions for some time to come, which will make it difficult to implement any perfect solution. One possible way to move towards greater numbers of electronic filings is to consider installing kiosks at clerk's offices where parties could fill out an electronic petition. Use of drop-down boxes for various options and automatic fill-in of the correct form of creditors' names could help to make responses more uniform and the system more feasible.

VI. Differential Treatment of Certain Data Users

Although there are good reasons to protect a debtor from those "outside" their particular bankruptcy case, this insulation creates real problems for others who might legitimately wish to participate in the bankruptcy or to get certain information from the bankruptcy case file. Two obvious groups which fall under this category are researchers and governmental units.

A Researchers.

The continuing rise in the filing rates of bankruptcy has led to several studies which attempt to determine why the filing rate continues to go up. For example, the Educational Endowment of the National Association of Bankruptcy Judges funded a multi-year study by law professors at Harvard, Texas, and Indiana in one attempt to make sense of the filing rate. The authors took samples of cases in several states, attempting to find patterns in the spending habits, age groups, gender groups, and the kinds of emergencies etc., which might define long-term causes and triggering events in consumer bankruptcy cases.

However, these researchers do not care *who* any individual debtor is, and they do not require any identifying information. They are looking for financial information, such as balances on credit card accounts and savings accounts, and they do want to know about the births of children, illnesses, divorces, traffic accidents and the like. But they do not need account numbers, names or social security numbers. As long as the devices put in place to prevent the identification of individuals do not bar the anonymous retrieval of this type of information, the legitimate academic use of bankruptcy case information will not be threatened.

A relevant precedent is the case of *Los Angeles Police Dept. v. United Reporting*, 528 U.S. 32 (1999), which upheld California's Govt. Code sec. 6254(f)(3) against a facial challenge. That statute required a person requesting an arrestee's address to certify that the request was being made for journalistic, scholarly, political, governmental, or investigative purposes, and would not be used to sell a product or service. United Reporting had collected arrestees' names and addresses in the past and sold such information to its customers, including attorneys, insurance companies, drug and alcohol counselors, and driving schools. When United Reporting challenged the validity of the statute, the Court held that the statute was not facially overbroad under the First Amendment, concluding it was not an abridgment of anyone's free speech rights, but simply a law regulating access to information in the hands of law enforcement agencies.

B. The Government as Creditor/Regulator

On the other hand, governmental entities who are creditors and/or regulators of debtors very much care who debtors are — particularly since their experience is that many debtors are intentionally trying to avoid this identification. Examples of these cases would be:

1. The governmental benefits provider (unemployment, AFDC, food stamps, etc.) who has issued benefits to a debtor under circumstances that constitute fraud. The debtor may have certified no income, no spouse present in the household, fewer assets than he/she really had, etc. When these individuals file bankruptcy, they generally do not list the state as a creditor unless the state has already obtained a state court judgment against them, even though they (the debtor) know they lied on their application for benefits. The government needs the social security number in these cases to confirm the identity of the debtor, and can use the statement and schedules (signed under penalty of perjury) to prove that the application for benefits was fraudulent.

2. Many agencies regulate the activities of debtors who have unincorporated businesses. The Rules do not necessarily require that debtors list regulators as parties in interest in their cases, even though it may be of great importance to identify the cases so that regulations can be enforced. In order to learn about such filings, it may well be necessary for the government to screen bankruptcies generally to determine if any filers are subject to regulatory concerns. Individual cases often involve businesses that must operate within strict taxation and environmental programs, and these debtors often mistakenly believe that the regulators are without the ability to enforce compliance once a bankruptcy is filed. Regulators are legitimately concerned about a debtors financial ability to comply with laws and regulations and about virtually all post-petition activities of a debtor.

3. Individuals who are being — or think they may be — prosecuted often file bankruptcy in an attempt to shield themselves from those actions. The bankruptcy may occur before criminal prosecution and the government lawyers involved in the case may be looking for information to support an indictment or for evidence in a trial (again, the idea that statements and schedules are filed under penalty of perjury is important here). Or, the government may have a conviction and order of restitution to enforce in the case. Often the same actions which constitute criminal conduct also give the trustee a cause of action on behalf of creditors of the estate, and any provisions which protect privacy of the *honest* debtor should have exceptions which allow a trustee and governmental entities to work together in response to less-than-honest behavior on the part of the debtor.

Large case loads and limited resources mean that many governmental entities will be able to use their rightful remedies under the code only if they can — easily — get enough information about a debtor to confirm identity and make the determinations which creditors routinely make in bankruptcies. Most courthouses are hours away and the ability to use the Internet to find this information has made quantitative and qualitative differences in government participation as

creditor and regulator in bankruptcy cases. Care should be taken to assure that protection of privacy does not become an invitation to debtors to attempt to discharge nondischargeable debts or avoid responsibility for illegal behavior through abuse of a “right” to privacy, that is really only a shield for concealing fraudulent behavior.

As to both researchers and the government, any changes should identify appropriate uses in advance (including, at a minimum, any circumstance where the government could obtain the data outside of bankruptcy) and allow for those parties to have full access on those bases, subject, at most, to a certification of their special status. It would be prohibitively burdensome for these parties to be required to prove their special circumstances every time they seek aggregate data or routine compliance information.

VII. Legislative Efforts

It is clear that the questions posed in the study capture the essence of today's privacy problem issues: too much information in one place which can provide a wealth of "identity" information for unscrupulous persons. There has always been a great deal of concern about keeping some information that is required by governmental agencies private, even if the information is needed to carry out the work of that agency. For instance, the use of Social Security Numbers has always been restricted to certain purposes, at least on paper, if not in actual practice. And when the information has been collected, it has been made clear by statutory prohibition that social security numbers collected pursuant to any provision of law enacted on or after October 1, 1990, is still confidential and cannot be disclosed by the collecting state or authorized persons pursuant to 42 USCA §405(c)(2)(C)(viii)(I). Likewise, statutory prohibitions exist concerning the disclosure of income tax returns, 26 USCA§7213(a)(1),(2) and (3), as well as the sale of either social security numbers or income tax returns. See 26 USCA §7213(a)(4).

Other statutes, in other areas of private identifying information have also been enacted. The Drivers Privacy Protection Act of 1994, 18 USCA §§2721-2725, as noted above, bars parties from disclosing a driver's personal information without the driver's consent. Additional problems have come to light in the *Toysmart* case. Assets or property of the debtor's estate in e-commerce may include personal information, which has been given to a business with the expectation of privacy, indeed with a declaration of privacy. However, because that information may now be worth the proverbial "pot of gold" when the company goes into bankruptcy, the privacy recitations are forgotten and disclosure or sale becomes the automatic response.

A number of bills have been introduced in Congress this year to deal with some of these issues. On July 10, Representatives Spencer Bachus (R-AL) and William Delahunt (D-MA) introduced H.R. 4814, which would make it an unlawful trade practice under the FTC Act to sell information over the internet with respect to which promises of privacy had been made. On July 12, Senators Patrick Leahy (D-VT), Robert Torricelli (D-NJ) and Herbert Kohl (D-WI) filed the "Privacy Policy Enforcement in Bankruptcy Act of 2000,” which would restrict identifying information of persons collected by a debtor from becoming property of the estate, if sale of such information would violate a privacy policy of the debtor in effect at the time of collection. An earlier bill, the "Consumer Privacy Protection Act," S. 2606, introduced on May 23, 2000, by

Sen. Ernest Hollings (D-SC) with 10 co-sponsors) deals comprehensively with many assets of on-line privacy. As a general matter it prohibits the use or release of personally identifying information unless the internet user has given affirmative consent in advance for any purpose. It also specifically provides, that such information is not property of the estate in a bankruptcy case.

While the bills plainly mean to protect the privacy of this information, it is questionable whether the approach taken – of removing such data from property of the estate – will solve the problem. To be sure if information is not property of the estate, it is not something the trustee can sell – but that presumably only means that the information will now belong to the debtor, not to the debtor-in-possession or its estate. In other words, this will treat such information as if it is an exempt asset. As a result, nothing in the Code would preclude an individual debtor from selling the information for his *own* benefit during the case. That would produce the worst of all possible results – dissemination of the information without any benefit to creditors. A better approach would probably be to leave the information in the estate, but to make clear that the filing of bankruptcy is not meant to allow it to be sold or used in any way inconsistent with its treatment under nonbankruptcy law. The basic question is not whether this is "property of the estate," but rather whether the debtor has a salable property interest at all in information that was obtained under certain limiting conditions. Forty-seven states filed objections in the *Toysmart* case to a proposed settlement of the charges against the debtor, resulting from its proposed sale. A copy of the objections are attached hereto, and the states submit that those objections represent an appropriate treatment of this issue.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re: TOYSMART.COM, LLC, Debtor.	Chapter 11 Case No.: 00-13995-CJK

OBJECTIONS OF THE STATE OF NEW YORK TO THE UNRESTRICTED SALE OF DEBTOR=S CUSTOMER LIST

To the Honorable Carol J. Kenner, United States Bankruptcy Court:

The People of the State of New York (ANew York State@), by their attorney Eliot Spitzer, Attorney General of the State of New York (AAttorney General@), hereby object to the sale of the Debtor=s right, title and interest in the Debtor=s customer list, including contents of its customer databases, which include detailed customer lists and related information (collectively Athe Customer List@ or Athe Debtor=s Customer List@), without any restrictions as to the privacy rights of these customers. Together with and in further support of the within Objections, the Attorney General also submits the Affidavit of Assistant Attorney General Stephen Kline (with exhibits), and the accompanying Memorandum of Law.

In short, Toysmart.com sells children=s toys through its website, <www.toysmart.com>. Since at least January 1999, Toysmart.com has posted a privacy policy on its website, which states:

> AAt toysmart.com, we take great pride in our relationships with our customers and pledge to maintain your privacy while visiting our site. Personal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is never shared with a third party@ (emphasis added).

Toysmart.com=s efforts to sell this personal data to a third party directly contravenes these representations, and would therefore constitute a deceptive business practice pursuant to New York=s Consumer Protections laws. Moreover, if any data was collected by Toysmart.com in violation of the recently-effective Children=s Online Privacy Protection Act of 1998, the sale of such data (along with its collection in the first instance) would be improper.

For the reasons set forth below, New York State respectfully requests that this Court enter an Order prohibiting the unrestricted sale of the Customer List.

I. The Sale Would Constitute a Deceptive Business Practice

Toysmart.com is an online store for children=s toys, accessible to New Yorkers and others via the Internet at <www.toysmart.com>. Toysmart.com promises customers in its privacy policy that A[p]ersonal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is **never** shared with a third party. . . . When you register with toysmart.com, you can rest assured that your information will **never** be shared with a third party (emphasis added).@ (Kline Aff., &11, 12; Exhibit F). Additionally, Toysmart.com is a licensee of the TRUSTe Privacy Program, and as such, promotes its privacy practices as consistent with TRUSTe guidelines, including the requirement that licensees will notify the consumer of any third party with whom their personal information may be shared. This promise to keep customers= personal information private is a very powerful and attractive one to consumers. The unrestricted sale of Toysmart.com=s customer list would directly contravene this representation, and thus would be a deceptive business practice in violation of New York=s General Business Law.

II. The Sale May Violate the Children=s Online Privacy Protection Act of 1998 (COPPA)

Millions of consumers have visited Toysmart.com since it was launched in January 1999,[1] allowing Toysmart.com to gather their Customer List of more than 250,000 names and associated personal information.[2] As of April 21, 2000, the Children=s Online Privacy Protection Act of 1998 (ACOPPA@), 15 U.S.C. '6501 *et seq*, requires, *inter alia*, websites directed to children under the age of 13 to post their privacy policies everywhere they collect personally identifiable information from children, and to obtain verifiable parental consent before collecting, using or disclosing such information. Toysmart.com has not complied with these requirements. If Toysmart.com=s customer list includes any personal information collected after April 21, 2000, from a child under 13, that data collection would be in violation of COPPA as would any subsequent sale of that data. Any sale of the customer list that does not ensure compliance with COPPA would, therefore, be improper.

III. The Debtor is Seeking to Sell in Bankruptcy Court What it Could Not Sell Outside

Toysmart.com=s customer list is limited in nature because Toysmart.com has promised in its privacy policy that customers= personal information is never shared, and will never be shared with a third party. Prior to the bankruptcy petition, Toysmart.com could not sell its customer list without violating state and federal law. Nonetheless, it now seeks to do in Bankruptcy Court what it could not do outside: disclose its customers= personal information to a third party. To do this would require that this Court disregard (i) the restrictions and limitations on the Debtor=s interest

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[1]Toysmart.com was ranked among the 25 most-visited-sites in December 1999, with 1.4 million visitors. Matt Richtel, *F.T.C. Moves to Halt Sale of Database at Toysmart*, NYTimes.com (July 11, 2000) (citing figures provided by Media Metrix, a website traffic monitor). <htttp://www.nytimes.com/library/tech/00/07/biztech/articles/11toysmart.html>.

[2]Although the exact size of Toysmart.com=s Customer List is not publicly known, Toysmart.com=s CEO David Lord has stated that the list included 260,000 individuals. *FTC Sues Over Data Base*, Wired.com (July 10, 2000).

in the Customer List, which are recognized as valid by the Bankruptcy Code 11 U.S.C. ' 541, and relevant case law, and (ii) the requirement of 28 U.S.C. ' 959 that the debtor in possession comply with applicable laws and regulations.

For the reasons set forth above, and detailed in the Memorandum of Law, the Attorney General respectfully requests that this Court enter an order prohibiting sale of the Debtors Customer List without any restrictions as to customer privacy rights.

Dated: July 20, 2000
New York, New York

Respectfully submitted,

ELIOT SPITZER
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*Motion for Admission Pro Hac Vice is being filed with the Court contemporaneously.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re: TOYSMART.COM, LLC, Debtor.	Chapter 11 Case No.: 00-13995-CJK

MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS OF THE STATE OF NEW YORK TO THE UNRESTRICTED SALE OF DEBTOR=S CUSTOMER LIST

Preliminary Statement

The People of the State of New York, by their attorney Eliot Spitzer, Attorney General of the State of New York (AAttorney General@), submits this Memorandum of Law in Support of Objections of the State of New York to the Unrestricted Sale of the Debtor=s Customer List.

Background

Toysmart.com, LLC, is a Delaware corporation, whose principal place of business is located at 170 High Street, Waltham, MA 02453.

Toysmart.com is an online store for children=s toys. It has been accessible to New Yorkers and others via the Internet at <www.toysmart.com> since at least January 1999. Toysmart.com collects personally identifiable information from customers, including children, through its website in two ways: (1) customers are required to give their name, age and email address in order to enter contests conducted by Toysmart.com (Kline Aff., &7; Exhibit D); and (2) customers are required to give name, full geographical address, phone number, email address and customer type in order to register as a member of Toysmart.com (Kline Aff., &13; Exhibit G). To this date, Toysmart.com=s website data-collection functions remain operative (Kline Aff., &7, 13; Exhibits

D, G).

From September 1999 to the present, the privacy policy posted by Toysmart.com on its site has promised customers that A[p]ersonal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is never shared with a third party. . . . When you register with toysmart.com, you can rest assured that your information will never be shared with a third party.@ (Kline Aff., &11, 12; Exhibit F).

Moreover, in September, 1999, Toysmart.com became a licensee of TRUSTe, a nonprofit organization that certifies the privacy policies of websites and allows such sites to display a TRUSTe seal or Atrustmark@ -- an online branded seal that takes users directly to the site=s privacy statement. The trustmark is awarded only to sites that adhere to TRUSTe=s established privacy principles of disclosure, choice, access and security. By displaying the TRUSTe mark, Toysmart.com agreed to notify customers of any third party with whom their information may be shared.

On May 19, 2000, Toysmart.com ceased operations. Three days later, on May 22, 2000, Toysmart.com announced that it had retained the services of The Recovery Group to locate parties interested in acquiring Toysmart.com=s business and assets. Toward that end, Toysmart.com ran a series of advertisements in the *Boston Globe*, the national edition of the *Wall Street Journal* and the online edition of the *Wall Street Journal* advertising the sale of Debtor=s assets, including the right, title and interest in the Debtor=s Customer List (including contents of its customer databases, which contain detailed customer lists and related information) (collectively A the Customer List@ or Athe Debtor=s Customer List@). (Debtor=s Motion for Authority to Sell Assets [Excluding Inventory] by Public Sale Free and Clear of Liens, Claims and Encumbrances, & 12).

On June 9, 2000, Toysmart.com=s creditors filed an involuntary petition for bankruptcy, and on June 23, 2000, Toysmart.com filed a consent to the order for relief under Chapter 11. Included in those assets offered for sale in the Chapter 11 proceeding is Toysmart.com=s Aright, title and interest in the Debtor=s Customer List (>Customer List=) including contents of its

customer databases including detailed customer lists and related information . . . .@ (Debtor=s Motion for Authority to Sell Assets [Excluding Inventory] by Public Sale Free and Clear of Liens, Claims and Encumbrances, & 28).

The sale of the Debtor=s Customer List without any restrictions as to customer privacy rights would contradict Toysmart.com=s privacy policy and therefore would violate New York General Business Law '349. Furthermore, the sale of any data that may have been collected by Toysmart.com in violation of the Children=s Online Privacy Protection Act of 1998 (COPPA) would also be improper. Whereas, in New York, the Attorney General is charged with the duty of enforcing compliance with New York=s General Business Law and COPPA, he now submits this Memorandum of Law in Support of Objections of the State of New York to the Unrestricted Sale of the Debtor=s Customer List.

I. The Unrestricted Sale Would Constitute a Deceptive Business Practice

The unrestricted sale of Toysmart.com=s Customer List, which it collected by promising customers that it would never share this data with a third party, would constitute a deceptive business practice under New York law. Section 349(a) of New York=s General Business Law prohibits A[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.@ N.Y. Gen. Bus. Law '349(a). The elements of a claim for deceptive practices are merely (1) that the act or practice was misleading in a material respect, and (2) consumer injury or harm to the public interest. See, e.g., People v. Court Reporting Institute Inc., 245 AD2d 564 (2d Dep=t 1997); People v. Empyre Inground Pools, Inc., 227 AD2d 731 (3d Dep=t 1996); People v. Apple Health and Sports Clubs, Ltd., Inc., 206 AD2d 266 (1st Dep=t), aff=d, 84 NY2d 1004 (1994).

Toysmart.com=s proposed sale directly contradicts repeated and explicit representations made to consumers at the time data was collected. Since at least January 1999, Toysmart.com has stated in its privacy policy that A[p]ersonal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is *never* shared with a third party. . . . When you register with toysmart.com, you can rest assured that your information will *never* be shared with a third party (emphasis added).@(Kline Aff., &11, 12; Exhibit F). Additionally, Toysmart.com is a licensee of the TRUSTe Privacy Program, and as such, promotes its privacy practices as consistent with TRUSTe requirements, including the obligation that licensees notify the consumer of any third party with whom their personal information may be shared.[1]

This promise to keep customers= personal information private is a very powerful and attractive one to consumers. While many commercial websites post a privacy policy,[2] what differentiates one website from another is a site=s information collection and disclosure practices.

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[1]http://www.truste.org.validate/3315 (visited July 14, 2000).

[2]Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress*, at 10 (May 2000).

The vast majority of Internet users have growing concerns about protecting their privacy while online, and in particular, object to the sale of personal information.[3] Websites that promise not to make such sales to a third party thus have a natural appeal to consumers, as well as a concomitant advantage in the marketplace. Toysmart.com=s proposal to sell its Customer List, in light of its prior representations to the contrary, is misleading in a material respect, and thus prohibited by Section 349(a). See, e.g., Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 273 (1977) (New York=s consumer protection laws protect not only the reasonable or average consumer, but Athe ignorant, the unthinking and the credulous@).[4] The only way to prevent the public harm that would result from this non-consensual disclosure is to prohibit the sale of the Customer List without any restrictions as to customer privacy rights.

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[3]See, e.g., *id.*

[4]In a private enforcement action, as compared to a public action, the State=s consumer protection statutes have been construed to require application of an objective standard, rather than a standard that protects the Acredulous.@ See, e.g., Oswego Laborers= Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (C.A. N.Y. 1995)(adopting an objective definition of deceptive acts and practices, namely, Arepresentations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances@). In any event, Toysmart=s proposed sale of its Customer List would be misleading under either standard, in light of its contrary representations regarding third party access to the information.

II. The Sale May Violate the Children=s Online Privacy Protection Act of 1998 (COPPA)

Toysmart.com=s collection of personal information from children may have violated the Children=s Online Privacy Protection Act of 1998 (ACOPPA@) and its implementing Rule. This statute was enacted in response to widespread public concern about the online collection of information from an inherently vulnerable population -- our nation=s children. COPPA requires that, as of April 21, 2000 (COPPA=s effective date), any operator of a website directed to children under the age of 13 must, inter alia, provide notice on the website of what information it collects from children, how it uses such information, and its disclosure practices for such information. 15 U.S.C. 6502(b)(1)(A)(i); 16 C.F.R. '312.3(a). The operator must also obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information obtained from children. 15 U.S.C. 6502(b)(1)(A)(ii); 16 CFR '312.3(b). Because Toysmart.com=s website is directed to children and because it does not currently appear to be in compliance with COPPA (see Kline Aff., Exhibits A-G), any information obtained by Toysmart.com from children under 13 during the period of April 21, 2000 to the present would have been collected in violation of COPPA.[5]

A. Toysmart.com is Subject to COPPA Requirements

COPPA covers all websites involved in interstate commerce that are directed to children under the age of 13. 15 U.S.C. '6501(1); 16 C.F.R. '312.2. The statute provides that:

> In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission

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[5]In a telephone conversation with Movant, Counsel for Debtor Toysmart.com was not able to rule out whether Debtor had collected any data from children under 13 during the period from April 21, 2000 to the present. Should Debtor determine that no such data collection occurred, and so represent to Movant and this Court, COPPA would not preclude the sale of Debtor=s Customer List. Movant=s objections to the unrestricted sale of the list on the basis of New York=s consumer protection statute would, of course, still stand.

> will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives.

16 CFR ' 312.2.

Applying these factors, it is clear that Toysmart.com=s website is Adirected to children,@ and must therefore comply with COPPA=s notice and parental consent obligations. Toysmart.com is an online store for children=s toys, and many of the graphics on Toysmart.com=s website appear to be targeted at children. The first graphic which a visitor to Toysmart.com=s site currently sees is a picture of a pre-teen female model. (Kline Aff., &3; Exhibit A). Throughout the site, there are numerous other models who appear younger than 10 years old. (Kline Aff., &3; Exhibits D, E, F). The site=s home page also contains images of Winnie the Pooh, characters from the Disney movie ADinosaurs,@ Madeline, Blue=s Clues, Arthur, Bear in the Big Blue House, characters from the movie AToy Story 2," Big Bird from Sesame Street, Max & Ruby, Harry Potter, Little Bear, Thomas the Tank Engine, Maisy, Franklin, Peter Rabbit, and Barney. (Kline Aff., &4; Exhibit A). Other pages display graphics of Dr. Seuss, Mickey Mouse, Tigger, Spot, and Curious George. (Kline Aff., &4; Exhibit B). In the center of the home page is an animated dinosaur, with a hyperlink to another Toysmart.com page entitled AWhat Kids Love . . . @, which contains three more cartoons of dinosaurs coupled with links leading to more dinosaur trivia. (Kline Aff., &5; Exhibit C). The website also offers a ADinosaur Contest,@ for which children must provide their name, email address and age. (Kline Aff., &7; Exhibit D). Additionally, children can create a gift registry through a page called MyToysmart, which requires them to give their name, full geographical address, phone number, email address and customer type. (Kline Aff., &13; Exhibit G). On this page, Toysmart.com acknowledges that children themselves can register for the service by stating, AIf you are under 18 years of age, you must have your parent or guardian=s permission to register.@ (Kline Aff., &13; Exhibit G).

B. Toysmart.com=s Data Collection Practices Do Not Comport with COPPA

Although Toysmart.com is Adirected to children,@ and thus subject to COPPA=s restrictions, Toysmart.com failed to adequately notify parents of its information collection practices as required by law. COPPA mandates that covered websites must A[p]rovide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information.@ 15 U.S.C. '6502(b)(1)(A)(i); 16 C.F.R. '312.2(a). More specifically, COPPA requires that an operator of a website directed to children post a link to a notice of its information practices with regard to children, both on the home page of its website and at each area on the website where personal information is collected from children. 16 C.F.R. '312.4(b). Additionally, the notice Amust be clearly and understandably written, be complete, and must contain no unrelated, confusing or contradictory materials.@ 16 C.F.R. '312.4(a).

Toysmart collects personally identifiable information from children through its website in two ways: (1) children are required to give their name, age and email address in order to enter contests (Kline Aff., &7; Exhibit D); and (2) children are required to give name, full geographical address, phone number, email address and customer type in order to register for MyToysmart. (Kline Aff., &13; Exhibit G). COPPA requires that notice of data collection practices be provided at both locations. Toysmart.com, however, neither posts its privacy policy, nor provides a link to the policy at the data-collection site within MyToysmart. (Kline Aff., &13; Exhibit G). Although Toysmart.com does provide a link to its privacy policy from the children=s contest page (Kline Aff., &9; Exhibit D), it allows children to enter the contest without providing a parent=s email address, despite the company=s stated policy of emailing each entrant=s parent with notification that their child has entered a contest, (Kline Aff., &10; Exhibit F). In light of these deficiencies in notification, any personally identifiable information that Toysmart.com may have collected from children under 13 after April 21, 2000 was not obtained in compliance with COPPA.

If Toysmart.com did collect information from children during the statute=s effective period, it also violated COPPA by failing to obtain verifiable parental consent before it collected information from children through MyToysmart=s registry. Toysmart.com=s only nod towards

fulfilling this statutory requirement is to tell visitors that, A[i]f you are under 18 years of age, you must have your parent or guardian=s permission to register.@ This warning, however, does not satisfy COPPA=s notice requirement. See 15 U.S.C. 6502(b)(1)(A)(ii); 16 CFR '312.3(b).

Because Toysmart.com has not complied with the requirements of COPPA, any sale (or other use) of debtor=s data collected after April 21, 2000 should not be permitted, without first confirming which registrants are children and without obtaining verifiable parental consent to use or disclose personal information collected from those children.

III. The Debtor is Seeking to Sell in Bankruptcy Court What it Could Not Sell Outside

Because of the restrictions on Toysmart.com=s Customer List imposed by its prior representations to consumers, an unfettered sale of the list clearly would violate both state and federal law. Nonetheless, Toysmart.com now seeks to shed the Customer List of its restrictions and to do in Bankruptcy Court what it could not do outside. However, precedent firmly establishes that Aonce a property interest has passed to the estate, it is subject to the same limitations imposed upon the debtor by applicable nonbankruptcy law.@ In re Amer. Freight Sys., Inc., 179 B.R. 952, 960 (Bankr.D.Kan.1995); see also In re Transcon Lines, 58 F.3d 1432, 1438 (9th Cir.1995) (noting that "nonbankruptcy law defines the nature, scope, and extent of the property rights that come into the hands of the bankruptcy estate"), cert. denied sub nom. Gumport v. Sterling Press, Inc., 516 U.S. 1146 (1996); In re Sanders, 969 F.2d 591, 593 (7th Cir.1992) ("[A] bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition."); In re FCX, Inc., 853 F.2d 1149, 1153 (4th Cir.1988) ("The estate under ' 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case."); In re Bishop College, 151 B.R. 394, 398 (Bankr. N.D.Tex.1993) (a bankrupt's estate receives trust assets "subject to any restrictions imposed by state law, pre-petition"). Integrated Solutions, Inc. v. Service Support Specialists, Inc., 124 F.3d 487, 492-93 (C.A. 3 1997)(AUnless federal bankruptcy law has specifically preempted a state law restriction imposed on property of the estate, the trustee's rights in the

property are limited to only those rights that the debtor possessed pre-petition. In other words, without explicit federal preemption, the trustee does not have greater rights in the property of the estate than the debtor had before filing for bankruptcy.@) No less important are the obligations imposed by 28 U.S.C. '959, which requires the Debtor to manage and operate the property according to the laws it would be subject to outside of Bankruptcy Court, including New York=s General Business Law and COPPA. In re Friarton Estates Corp., 65 B.R. 586, 592 (A[D]ebtor-in-possession must operate its building according to the dictates of non-bankruptcy law that would apply if there were no Chapter 11 case.@); Savaria v. 1736 18th St., N.W., L.P., 844 F.2d 823, 826 (C.A. D.C. 1988)(ACongress explicitly stated that debtors-in-possession are not exempted from local law by virtue of federal bankruptcy law.@). Because Toysmart.com has no more rights in its Customer List in Bankruptcy Court than it did before filing for bankruptcy protection, it cannot sell its Customer List in a manner that contravenes any restrictions in place at the time of data collection, including an unrestricted sale to a third party.

Conclusion

For the reasons set forth above, and detailed in the Memorandum of Law, the Attorney General respectfully requests that this Court enter an order prohibiting the unrestricted sale of the Debtor=s Customer List.

Dated: July 20, 2000
New York, New York

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York

_____

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re: TOYSMART.COM, LLC, Debtor.	Chapter 11 Case No.: 00-13995-CJK

RESPONSE OF THE STATE OF NEW YORK TO DEBTOR=S MOTION TO APPROVE STIPULATION WITH FEDERAL TRADE COMMISSION AND FOR AUTHORITY TO ENTER INTO CONSENT AGREEMENT

The People of the State of New York (ANew York State@), by their attorney Eliot Spitzer, Attorney General of the State of New York (AAttorney General@), hereby respond to Debtor=s Motion to Approve Stipulation with the Federal Trade Commission and for Authority to Enter Into Consent Agreement (AMotion to Approve Consent Agreement@):

1. Toysmart.com (ADebtor@) sells children=s toys through its website, <www.toysmart.com>. In connection with its sales and various promotional efforts, Toysmart.com has collected personal customer information via its website, including consumers= names, addresses, e-mail addresses, billing information, and shopping preferences (collectively referred to as the ACustomer List@). Since 1999, Toysmart.com has posted a privacy policy on its website, which states that this personal information Awill never be shared with a third party@ (emphasis added). Toysmart.com has also posted a seal from the TRUSTe Privacy Program (the TRUSTe Privacy Mark), which informs consumers that Toysmart.com adheres to TRUSTe=s privacy principles. As specified in a license agreement granted to Toysmart.com by TRUSTe, Toysmart.com must abide by its own privacy policy. Furthermore, it may not use or permit distribution of collected information for any reason other than the reason for which it was collected.

Barnhill, Leander

From: bev williams [goldenwish@juno.com]
Sent: Thursday, September 28, 2000 7:35 PM
To: USTPrivacyStudy
Subject: Privacy Study.

As a creditor who was grossly abused in the bankruptcy process, I have a comment.

Pursuing the privacy issue of bankruptcy is going to far. Too much protection is given to the Bankruptcy Debtor and more and more protections are being taken away from the creditors and the public.

Our government is providing this privilege of bankruptcy at the expense of the public.

Bankruptcy is a public issue and bankruptcy petitions should be made publicly available since all public issues are open to public scrutiny.

Bankruptcy is a privilege that is made available by our Federal Government. It is not mandatory.

Since this is an expense burdened by the public, all such detailed information regarding public expenses should be made publicly available.

Public scrutiny of bankruptcy petitioners serves a useful purpose in that it helps to eliminate bankruptcy fraud.

Making bankruptcy petitions unavailable to public scrutiny will be a violation of the 14th Amendment to the public citizens.

I believe that the Bankruptcy Court has lost total sight of the Creditors in the Bankruptcy Arena. The Bankruptcy Court and the UST Program seems only interested in protecting the rights of the Debtor. Creditors are US citizens too and deserve equal rights under the Bankruptcy Laws. I believe that Bankruptcy already violates the Creditor's rights that are supposed to be protected under the 14 Amendment .

Yes, I am angry at the Bankruptcy Institution because I was a creditor who saw none of my rights protected and I witnessed fraud at it's greatest. The only thing that helped me in my case was that the bankruptcy petition of the debtor was made public. It allowed me to see abuse and it allowed others to see abuse.

National Association of Consumer Bankruptcy Attorneys
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September 29, 2000

RECEIVED
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EXECUTIVE OFFICE FOR
U.S. TRUSTEES

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E St. N.W., Suite 780
Washington D.C. 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Mr. Barnhill:

Enclosed are the comments of the National Association of Consumer Bankruptcy Attorneys on the referenced study your office is conducting. The **subject** of this study is of great importance to the clients of our members. Accordingly, our organization is extremely interested in assisting your office in fully assessing the complex issues involved in it.

Thank you for the opportunity of providing these comments and we remain ready to offer any additional insight or information you may request.

Sincerely,

Norma Hammes

NORMA HAMMES
President

encl.

COMMENTS ON STUDY OF PRIVACY ISSUES IN BANKRUPTCY DATA

Requested by the U.S. Departments of Justice and Treasury and the Office of Management and Budget

Submitted by the
National Association of Consumer Bankruptcy Attorneys (NACBA)
2300 M St. N.W., Suite 800
Washington, D.C. 20037
(202) 331-8005 Fax (202) 331-8535

September 29, 2000

NACBA submits these Comments with respect to consumer Chapter 7 and Chapter 13 cases, as well as small business Chapter 13 cases.

1.1 Types of information collected, maintained, and disseminated.

a. ***Information which is submitted along with a bankruptcy petition.***
11 U.S.C. § 521 and Federal Rule of Bankruptcy Procedure (FRBP) 1007 require the debtor to submit the following information:

(1) All names (including fictitious business names) used by the debtor within six years of the bankruptcy filing; [1.2]

(2) The debtor's social security number and employer identification number (if the debtor is or has been engaged in business); [1.2]

(3) All addresses of the debtor within two years of the bankruptcy filing; [1.2]

(4) List of all assets of the debtor, including among others: [1.2]
- (a) Bank accounts (perhaps with account numbers)
- (b) Insurance policies
- (c) Shares of stock or stock options, or bonds
- (d) Household furnishings, personal effects, jewelry
- (e) Retirement plans, annuities, trust interests
- (f) Vehicles, business equipment, causes of action or litigation
- (g) real property interests
- (h) interests in property owned jointly with non-filing persons, including spouses or other relatives
- (i) property for which the debtor serves as custodian or trustee

(5) List of all debts of the debtor, with account numbers, dates incurred, and amounts owed. This list includes debts of the following types (although

the current bankruptcy schedules do not separately identify these categories as such): [1.2]

(a) Debts which ***will*** survive bankruptcy, such as:
  (i) nondischargeable income taxes
  (ii) nondischargeable student loans
  (iii) nondischargeable child and spousal support
  (iv) mortgage loans
  (v) vehicle loans and other secured debts
  (vi) leases which will be assumed by the trustee or debtor
(b) Debts which will be wiped out in bankruptcy
(c) Debts of a non-filing spouse for which the debtor may be liable under state law (including account numbers)

(6) Names and addresses of non-filing codebtors [1.2]

(7) Projected monthly income of the debtor (and the debtor's non-filing spouse in Chapter 12 and 13 cases), including gross income and deductions; and the job title and name and address of the employers, as well as length of employment; [1.2]

(8) Projected itemized monthly expenses, including sensitive items such as religious donations, fines, and specialized school expenses; [1.2]

(9) Debtor's income and sources of income for the last two years; [1.2]

(10) Names and addresses of relatives or other insiders who have received payments from the debtor within the last year (potential preferences); [1.2]

(11) Names, relationships and ages of those dependents for whom the debtor either pays or receives support;

(12) Debtor's fire, theft, casualty or gambling losses within the last year; [1.2]

(13) Debtor's payments for bankruptcy consultations or services within the last year; [1.2]

(14) Locations of safe deposit boxes open within the last year; [1.2]

(15) Names and addresses of all businesses the debtor has been involved in operating within the last two years; [1.2]

(16) The debtor's attorney (or a non-attorney bankruptcy petition preparer) must disclose fees paid (or promised to be paid) by the debtor within a year of the bankruptcy [1.2]

b. ***Information which is submitted <u>after</u> a bankruptcy petition is filed.***

(1) Chapter 7 Consumer Debtors
  (a) In "no-asset" cases, it is rare for the debtor to be required to submit additional information to the court or trustee

(b) In "asset" cases, the debtor may be required to submit copies of tax returns (including the one filed after the bankruptcy filing); W-2s, 1099s, paycheck stubs, invoices, receipts, and bank statements. [1.3]

(2) Chapter 13 Debtors

(a) The debtor keeps the trustee informed of his/her residence and/or mailing address, and name and address of employer [1.3]

(b) The debtor must usually apply (providing detailed proposed terms) to the trustee or the court for permission to: [1.2 or 1.3]

(i) borrow money, such as obtain a loan to replace a vehicle

(ii) sell, refinance, purchase, or otherwise use property which has not been revested in the debtor

(iii) acquire a business interest

(c) The debtor's attorney often is allowed attorney's fees in a semi-fixed amount which is paid through the debtor's Chapter 13 plan payments. If the attorney's required services exceed the usual allowed amount, the attorney must apply to the court for approval of the additional fees [FRBP 2016]. If the fees exceed $500, the application must be noticed to all creditors, as well as the Trustee and US Trustee [FRBP 2002]. The application must include an itemization of all services performed by the attorney. Depending on the degree of detail, this requirement may compromise the attorney-client privilege. [1.2]

(d) The trustee maintains records of: [1.3]

(i) the debtor's payments into the plan

(ii) the debtor's address and employer's name and address

(iii) names, addresses, account numbers of creditors which have filed claims in the debtor's case

(iv) amounts and categories of creditors' claims

(v) payments to these creditors

(e) The creditor files a proof of claim with amount, account number, category and any documentation, attached. [1.2]

(f) Creditors may file Motions for Relief from the Automatic Stay during the Chapter 13 case in order to proceed against property of the debtor in certain cases. For example, if a debtor falls behind on his/her home mortgage payments after filing a Chapter 13 case, the mortgage lender may file such a motion to proceed to foreclose on the home. Detailed information regarding the debtor's payments or failure to make payments is often filed with the court and served on the trustee. Motions for Relief may also be filed in Chapter 7 cases, but are not so frequent because the time between filing and discharge (when the automatic stay is vacated by law) is only a few months. [1.2]

c. ***Information which is disseminated after a bankruptcy petition is filed.***
In addition to the dissemination of data mentioned above, whenever creditors are noticed in a case, the debtor's social security number and address must be included in the notice. Examples of such notices include, among others: [1.2]

(a) Chapter 13 plan modification applications

(b) Attorney's fee applications
(c) Applications to sell, refinance, purchase, or otherwise use property
(d) Objections to creditors' claims
(e) Motions to avoid or value liens

1.2 The items in 1.1 above which are public record data are annotated with [1.2].

1.3 The items in 1.1 above which are non-public record data held by bankruptcy trustees are annotated with [1.3].

1.5 More Sensitive Types of Data.

The most sensitive types of data include the debtor's social security number; current address; employer's name and address; names, addresses, account numbers, balances, description of security with regard to debts which survive bankruptcy; account numbers of bank accounts and safe deposit boxes; names and addresses of non-filing codebtors; names and ages of non-filing support payees; job title, employer and income of non-filing spouse; names and ages of dependents; sensitive budget items such as religious donations, fines, and specialized school expenses.

1.6 How Valuable is the Information in the Marketplace?

This information is sufficiently valuable so that an industry to compile and disseminate much of it (privately or publicly) has begun to develop, including:

a. segments of the credit card industry which coordinate objections to discharge and market new credit to bankrupt debtors
b. collection agencies which buy and file claims in Chapter 13 cases
c. credit reporting agencies
d. private case filing compilers
e. NACTT's proposed sale of Chapter 13 plan claim and payment information
f. Chase Bank's ownership of the site used by many Chapter 13 trustees across the country for managing receipts and payments in their cases
g. internet retailers (e.g., Amazon.com, per a recent news article) that may adjust discounts offered to purchasers based upon their individual demographics -- or, conceivably, based upon the fact that they have filed a bankruptcy and the impression that they may be less discerning consumers
h. U.S. Bankruptcy Courts' on-line calendaring and electronic case filing systems

2.0 Current & Envisioned Practices for the Collection, Analysis & Dissemination of this Information.

This question is better answered by those who collect, analyze, and disseminate this information.

3.0 What Access Do Various Parties Need?

This information is better answered by those who need to access the information. However, the primary reason for creditors to require this information is in order to be able to identify the debtor and differentiate him/her from others with similar names in order to locate the account balance. It should be noted that under current law, it is not unusual for creditors to misuse bankruptcy information. For example, vindictive former spouses or in-laws on occasion misuse public bankruptcy information to humiliate honest debtors. Similarly, stalkers or abusive former spouses/boyfriends can locate their victims through information in their bankruptcy files.

4.1 Do debtors have privacy interests in public record data?
Particularly given the broad dissemination of public record data which exists, debtors are entitled to have the information they provide protected from unnecessary disclosure. In particular:

a. Although pending bankruptcy legislation advocated by the credit card industry would make the current problem much worse, debtors should be required to provide no more information than is necessary for:
   (1) the creditors to identify the debtor in order to file a claim
   (2) the trustee to review the debtor's assets, their values, and the debtor's right to the claimed exemption
   (3) the trustee to review the debtor's ability to repay his/her debts

4.4 To what extent do bankruptcy debtors understand that their bankruptcy file is available to the public?
While bankruptcy debtors generally are very fearful about the bankruptcy process and tend to assume that they will be humiliated throughout it, they are normally unfamiliar with the bankruptcy court filing system. For example, it comes as a surprise to some of them that they do not need to personally go to the bankruptcy court to file the case -- some think that the court hearing comes at the beginning, rather than a month into the process. The system of having voluminous files for each case is probably imagined only by debtors who work with bureaucratic filing systems in their own jobs. In addition, the fact that these files may be available for review by any member of the public is probably not envisioned by debtors.

4.5 Should bankruptcy debtors be required to forego some expectation of privacy?
Bankruptcy debtors should not be required to forego any expectation of privacy, except to the extent it is inconsistent with providing information on a "need to know" basis, with all possible precautions and protections in place.

4.6 Are there characteristics about bankruptcy debtors that raise special privacy concerns?
As shown by recent studies conducted by Professors Elizabeth Warren and Jay Westbrook, a significant percentage of bankruptcy debtors are single parents (primarily mothers) with children. These debtors are particularly likely to be victims of abuse or involved in acrimonious relationships with the other parent or former in-laws. As noted above, these debtors need extra protection with regard to personal data included in bankruptcy files. In addition, the elderly may be more vulnerable to scams and could be targeted by using information in bankruptcy files.

4.7 What are debtors' expectations about uses and disclosures of information by bankruptcy trustees?
In general, debtors expect that information which they provide directly to the trustee will be kept private by the trustees.

4.9 What would be the consequences if non-public data were made widely available?
Non-public data such as tax returns, paycheck stubs, and bank statements, would seriously compromise bankruptcy debtors if they were made available to creditors and the public. Pending bankruptcy legislation would require the filing of several years of tax returns with the bankruptcy court for each debtor, reversing our historical protection of the privacy of tax returns.

STATEMENT OF THE NATIONAL DATA CENTER, INC., IN RESPONSE TO REQUEST FOR PUBLIC COMMENT ON FINANCIAL PRIVACY AND BANKRUPTCY

INTRODUCTION

The National Association of Chapter Thirteen Trustees ("NACTT") is a thirty-two year old, not-for-profit organization with the express mission of improving the Chapter 13 bankruptcy system by increasing the knowledge and expertise of those who work in the Chapter 13 bankruptcy arena including standing trustees, attorneys, creditors, financial institutions, educators, and researchers. The NACTT has approximately 850 members, including 98% of the Chapter 13 trustees in the country.

In 2000, the NACTT established a separate, not-for-profit organization known as the National Data Center ("NDC"), for the purpose of providing to trustees a cost effective and efficient method to "furnish information concerning the estate and the estate's administration as is requested by a party in interest" as they are required to do by 11 U.S.C. §§ 1302(b) and 704(7). Specifically, the NDC is currently engaged in establishing an Internet site that will collect selected Chapter 13 case information from Chapter 13 trustees across the country, and then make that information available to creditors. Information posted on the NDC's web site will primarily consist of the status of the case, filed proofs of claims, a history of the debtor's payments to the trustee, and a history of the trustee's disbursements to creditors. The NDC will implement appropriate technological and contractual safeguards to ensure that only parties in interest will be able to access information over the Internet, and that such information will only be used for the purpose of asserting or collecting a claim against a bankruptcy estate. The NDC anticipates opening its web site to parties in interest before the end of the year.

To prepare the infrastructure for the NDC's web site, trustees have expended significant effort and resources to ascertain the privacy issues implicated when Chapter 13 case information is made accessible to parties in interest over the Internet. In connection therewith, the NDC has solicited and received the assistance of the Executive Office of the United States Trustees, members of the NACTT, creditors and creditor collection agencies, academics, public interest groups and others. Through the significant input of these groups, the NDC believes that it has struck a fair balance between the statutory rights of creditors and the privacy interests of Chapter 13 debtors.

To assist in the government's Privacy Study, the NDC hereby submits a response to the questions raised by the solicitation for public comment. The NDC's comments are based on its experience over the past two years in seeking to develop appropriate standards for the display on the Internet of Chapter 13 case information to parties in interest.

NATURE OF INFORMATION

Information collected by Chapter 13 trustees in connection with their administration of bankruptcy cases tends to fall into several categories.

Case Information. The first category is information that a debtor is required to disclose in connection with filing a Chapter 13 petition for relief. Such information is set forth in a debtor's bankruptcy statements and schedules and includes the following: a list of the debtor's real and personal

property (Schedules A and B); a list of secured, priority and unsecured debts (Schedules D, E, and F); a list of contracts or leases to which the debtor is a party (Schedule G); a budget of the debtor's monthly income and living expenses (Schedules I and J); a three-year history of the debtor's gross income (Schedule of Financial affairs Questions 1 and 2); transfers made by the debtor prior to filing bankruptcy (Questions 3, 5, 7 and 10 of the Statement of Financial Affairs); and lawsuits and repossessions involving the debtor (Questions 4, 5, and 6 of the Statement of Financial Affairs). **Case information** also includes any subsequently filed paper filed with bankruptcy court in connection with the case such as motions, objections, orders, etc. Pursuant to 11 U.S.C. § 107, any paper in the bankruptcy court file is available at the bankruptcy court "for examination by an entity at reasonable times and without charge."[1]

While it initially appears that **Case Information** is strictly financial in nature, when reviewed as a whole, it is possible to ascertain a great deal of personal and private information about a debtor such as age, martial status, schooling, criminal or civil actions, gambling habits, religious or political affiliations, physical or mental health conditions, spending preferences, etc.

Chapter 13 trustees maintain some **Case Information** in a computerized database, but most of it is stored in the trustee's file through copies of the debtor's bankruptcy petition and statements and schedules. The NDC believes that in the near future, trustees will store most, if not all, **Case Information** solely in an electronic format.[2]

Status Information. The trustee is charged with implementing the provisions of the debtor's confirmed Chapter 13 plan. In so doing, the trustee accumulates significant data relating to claims filed against the estate, the debtor's payments to the trustee, the trustee's distributions to creditors, and the projected timing of claims distributions and plan completion. Trustees generally make **Status Information** available to creditors pursuant to 11 U.S.C. § 704(7), as made applicable by 11 U.S.C. § 1302(b)(1), which states that a Chapter 13 trustee "shall … unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." Information regarding a debtor's payments and the trustee's distributions is only available from the trustee.

Investigative Information. Because Chapter 13 trustees are statutorily obligated to investigate a debtor's financial affairs,[3] the trustee may collect and store other, more comprehensive, information. For example, if a debtor is engaged in a business under 11 U.S.C. § 1304, a trustee may obtain copies of tax returns, financial statements, bank accounts, and contracts. The trustee will review such information and then file a business report with the bankruptcy court.[4] While trustees generally do not make **Investigative Information** available to persons outside the trustee's office, the resulting business report filed with the bankruptcy court becomes **Case Information** that is available for review by any entity under 11 U.S.C. § 107.

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[1] Section 101(15) of the Bankruptcy Code defines "entity" to include a "person, estate, trust, governmental unit, and the United States Trustee." Therefore, there are essentially no restrictions on who may review a debtor's information contained in the bankruptcy court file.

[2] As more courts accept, and even require, bankruptcy petitions and statements and schedules to be filed by electronic means, the NDC anticipates that the court will eventually download case data directly into the Chapter 13 trustee's computerized data base.

[3] See 11 U.S.C. § 704(4) made applicable to Chapter 13 trustees by 11 U.S.C. § 1302(b)(1).

[4] Pursuant to 11 U.S.C. §§ 1302 and 1106, the trustee is to investigate and file a report with the bankruptcy court regarding the debtor's business operation.

Work Product Information. By contesting confirmation of a debtor's plan or objecting to a creditor's claim, the Chapter 13 trustee often participates as a litigant in the bankruptcy case. Thus, information gathered and maintained in the trustee's files in connection with such litigation or contested matter qualifies as attorney work product that is privileged under the Federal Rules of Evidence. **Work Product Information** is not disclosed to anyone outside of the trustee's office.

Counseling Information. In an effort to satisfy the requirements of 11 U.S.C. § 1302(b)(4), the trustee may act as a counselor or educator to the debtor.[5] The trustee may accumulate information that derives from this particular function such as notes from communications or meetings with debtors. The trustee generally does not disclose such information to persons outside the trustee's office.

Intra-Office Information. Most trustees maintain electronic or paper "case notes" that summarize the history of the case such as phone calls or letters to the trustee, deadlines set by the court or the trustee, court rulings, subjective observations or opinions of the trustee or trustee's staff regarding issues, etc. **Intra-office Information** is not intended for use outside of the trustee's office.

In summary, trustees retain the following information in connection with their administration of Chapter 13 bankruptcy cases:

- **Case Information:** Information derived from the petition, accompanying bankruptcy statements and schedules, and other papers filed with the bankruptcy court. All **Case Information** is available to the public from the bankruptcy court.

- **Status Information:** Information primarily of a financial nature related to the implementation of the confirmed Chapter 13 plan such as filed claims, debtor payments, trustee distributions, critical dates, and status of the case. Payment and disbursement information is only available from the trustee who makes it available to parties in interest upon request.

- **Investigative Information:** Information derived from investigation of the debtor's affairs. **Investigative Information** is not made available to the public or parties in interest; however, portions of it may be contained in the business report that the trustee is required to file with the bankruptcy court. As part of the bankruptcy file, the business report is available for review by the public or parties in interest at the bankruptcy court.

- **Work Product Information:** Information collected by the trustee in connection with actual or anticipated litigation. **Work Product Information** is generally not made available to the public or to parties in interest.

- **Counseling Information:** Information collected by the trustee in connection

[5] Section 1302(4) obligates a trustee to assist and advise the debtor on matters, other than legal, regarding the debtor's performance under the plan. Some trustees employ "case counselors" to work with debtors in meeting plan requirements and some trustees employ full or part time educators to provide budgeting and credit counseling programs for debtors.

with counseling a debtor through an educational program or one-on-one communications. **Counseling Information** is generally not made available to the public or to parties in interest.

- **Intra-Office Information:** Personal observations, warnings, critical internal dates or other notes made by the trustee's staff. **Intra-Office Information** is not made available to the public or to parties in interest.

WHAT TYPES AND AMOUNTS OF INFORMATION ARE COLLECTED FROM AND ABOUT INDIVIDUAL DEBTORS, ANALYZED AND DISSEMINATED IN PERSONAL BANKRUPTCY CASES?

As noted above, trustees collect a variety of information pursuant to their statutory duties. Creditors or other persons will often ask the trustee for access to such information. Whether a trustee will disclose information depends on the person making the request, the scope of the request, and the purpose for the request.

Pursuant to 11 U.S.C. § 704(7), as made applicable by 11 U.S.C. § 1302(b)(1), the trustee only has a duty to provide information to parties in interest. Applicable case law has defined a "party in interest" as a person with a legally cognizable interest that could be affected by the bankruptcy case.[6] The NDC believes that parties in interest should only obtain information from the trustee for the purpose of taking lawful actions to assert or collect a claim against the bankruptcy estate. Therefore, pursuant to their duty under 11 U.S.C. § 704(7), trustees will generally provide **Status Information** to parties in interest using one or more of the following methods: (1) posting information on the Internet; (2) providing modem access to a copy of the trustee's computerized data base; [7] (3) responding in writing; or (4) allowing physical access to the trustee's files.

The philosophy behind the Bankruptcy Code's mandate to make information available to the public and to parties in interest is two-fold. First, bankruptcy substantially alters a creditor's contractual rights to collect a claim – often to the extent of extinguishing the claim. In exchange for such a drastic, involuntary modification of contractual rights, a creditor is entitled to full disclosure of a debtor's financial affairs so the creditor can make informed decisions regarding its participation in the bankruptcy case. A debtor's full disclosure of financial information, even if such disclosure reveals personal and private information, is the *quid pro quo* for the debtor's ability to substantially alter or extinguish monetary liabilities and thereby obtain a financial fresh start.

Second, the bankruptcy system has relied upon the active participation of creditors or other parties to minimize debtor abuses. The bankruptcy process expects persons with knowledge, generally creditors, to notify the trustee and the court if they believe a debtor has misrepresented or concealed financial information. By making bankruptcy information available to the public and to parties in interest, they can compare that information against their own knowledge of the debtor's financial affairs and report any discrepancies. This creates the needed "check and balance" to ensure the debtor's full and complete disclosure.

WHAT ARE THE CURRENT PRACTICES, AND PRACTICES ENVISIONS FOR THE

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[6] *See In re James Wilson Assoc*., 965 F.2d 160, 169 (7th Cir. 1992).

[7] Trustees never allow anyone to have direct access to their live databases.

FUTURE, FOR THE COLLECTION, ANALYSIS, AND DISSEMINATION OF INFORMATION IN PERSONAL BANKRUPTCY PROCEEDINGS?

As noted above, each trustee maintains and discloses information differently. Most trustees collect **Case Information** from copies of documents filed with the clerk's office, although an increasing number of trustees receive this information from the court electronically.[8]

Most trustees input **Status Information** directly into their computerized databases since they are the source of such information. As stated above, trustees have a statutory duty to provide **Status Information** to parties in interest.

Trustees create notes and collect documents related to **Investigative Information**, **Work Product Information,** and **Intra-Office Information**; however, such information is generally not disseminated to persons outside the trustee's office.

Some trustees are actively involved in providing educational programs for Chapter 13 debtors. Debtors who complete their Chapter 13 case and provide a reasonable return to creditors may qualify special lending programs to help them restore their credit rating. In such cases, the trustee may disclose **Counseling Information** to participants in a credit rehabilitation program.

In the very near future, the NDC (acting for the benefit of trustees) will make **Status Information** available over the Internet to parties in interest. In so doing, the NDC will contract with trustees regarding the following:

- The trustee will agree to transmit selected **Status Information** to the NDC on a regular basis.

- The trustee will provide debtors notice of the fact that their **Status Information** will be available for review on the Internet by parties in interest. The notice will also disclose the location of the NDC Internet site and inform debtors that they may review their **Status Information** on the NDC Internet site and contact the NDC or the trustee to report any allegedly inaccurate information.

- The trustee will agree to immediately investigate and, if necessary, rectify any alleged errors in the data as reported by a debtor.

- The trustee will work towards a unified method of identifying national creditors among all trustees.

The NDC, in turn, will contract with creditors who subscribe to the NDC Internet site regarding the following:

- The creditor will agree to use **Status Information** only for the lawful assertion or collection of a claim against a bankruptcy estate.

[8] Trustees can receive direct downloads of **Case Information** from the clerk in districts where the court has implemented electronic filing. A few trustees obtain an electronic file after the clerk has manually input **Case Information** into the court's computerized database.

- The creditor will agree not to sell **Status Information** to third parties or to use such information for the purpose of marketing, advertising, extending credit, offering insurance, or making employment decisions.

- The creditor will move towards using a single identifying number and/or address when participating in bankruptcy cases.

- The creditor will submit to an internal or external audit to ensure that a creditor does not breach contractual use-restrictions relating to a debtor's information.

By undertaking to provide **Status Information** to parties in interest, the NDC will agree to the following:

- The NDC will establish and maintain a secure electronic database to hold **Status Information** obtained from trustees and to prevent the unauthorized access to such information.

- The NDC will permit only identified parties in interest to access **Status Information**.[9]

- The NDC will limit displayed information, and particularly personal identifiers (i.e., the debtor's employer or social security number will not be disclosed), to the minimum amount necessary to allow creditors to monitor and assert or collect their claims.

- The NDC will solicit reports of potentially incorrect **Status Information** and will forward such reports to the trustee providing the information for investigation and, if necessary, correction.

- The NDC will consolidate and display **Status Information** in a manner and format that renders the data more usable.

WHAT ACCESS DO VARIOUS PARTIES NEED TO FINANCIAL INFORMATION IN PERSONAL BANKRUPTCY CASES? WHICH INDIVIDUALS OR ENTITIES REQUIRE ACCESS TO WHICH PARTICULAR TYPES OF INFORMATION, OR WHAT PURPOSES, AND UNDER WHAT CIRCUMSTANCES?

As described more fully above, parties are interest are entitled to sufficient information to enable them to make informed decisions regarding their participation in a bankruptcy case.

In addition, the Bankruptcy Code was written with the assumption that generally a creditor holding a claim on the petition date will hold that claim throughout the case. However, in today's credit environment, institutional creditors often sell their claims in bulk to entities that specialize in the purchase of bankruptcy claims. As a result, **Status Information** has value to parties involved in the sale of bankruptcy claims. From such information, the claimholder and potential purchaser can more accurately

[9] On the NDC web site, a creditor will only be able to view **Status Information** for a case if the creditor appears as a "party in interest" in the case, meaning at least one of the following conditions is met: (1) the debtor listed the creditor in the bankruptcy schedules; (2) the creditor has filed a proof of claim; or (3) the creditor has filed a notice of appearance. If the creditor does not appear in the case under one of these conditions, it will not be able to view any information regarding the case.

value claims based on the anticipated distribution in the Chapter 13 case.

Whether it seeks to collect its own claim or to sell it to a third party, the creditor must presently deal with an extremely inefficient data-collection process. The creditor must solicit **Status Information** from more than 200 different Chapter 13 trustees, each with a different information system and acquisition protocols (i.e., Internet, modem access, written requests, etc.).[10] To obtain information from each trustee's system, the creditor must procure and maintain up to 200 different access agreements, user names and passwords. The creditor must then consolidate the 200 different sets of information into a uniform whole. Therefore, it is not surprising that several for-profit information services have arisen to assist creditors and potential claim purchasers in obtaining information and consolidating it into a useable format.

As a result of the considerations set forth herein, the NDC takes the following position regarding the disclosure of information.

[10] There are generally four vendors that provide trustees with specialized Chapter 13 case management and accounting software. However, each trustee office uses different hardware and software configurations to store and retrieve such data.

The NDC believes that trustees should generally not be required to disclose **Case Information** since it is readily available from the bankruptcy court.[11]

Trustees should generally not be required to provide any information to persons who are not parties in interest.[12]

Trustees should be allowed to disclose **Status Information** to parties in interest.

Trustees should be allowed to provide **Status Information** to the NDC which will avoid profiteering in debtor information while protecting the legitimate privacy interests of debtors.

The NDC should be allowed to consolidate, configure, and display **Status Information** in a format that makes it more meaningful to parties in interest.

While trustees collect and maintain **Investigative Information**, **Work Product Information, Counseling Information** and **Intra-Office Information** to fulfill their statutory obligations, its disclosure should be limited for the following reasons:

Much of this information implicates legitimate privacy concerns of the debtor.

This information is not reasonably necessary for parties in interest to assert and protect their claims in a bankruptcy case.

A person may be able to acquire independently this information from the debtor, and possibly from the trustee, through appropriate discovery requests (subpoena, interrogatories, and production of documents) under the Federal Rules of Civil Procedure with its applicable safeguards.

WHAT ARE THE PRIVACY ISSUES RAISED BY THE COLLECTION AND USE OF PERSONAL FINANCIAL AND OTHER INFORMATION IN PERSONAL BANKRUPTCY PROCEEDINGS?

Presently, debtors do not fully understand that the **Case Information** they provide in connection with their bankruptcy filing is statutorily defined as "public information." As such, debtors are unaware that their bankruptcy court file, that can contain such personal information as their employer, monthly income, social security number, marital status, ages of children, medical conditions, religious or political affiliations, criminal or civil lawsuits, etc., is "open to examination by an entity at reasonable times without charge." *See* 11 U.S.C. § 107(a). The NDC makes no comment on the privacy issues raised by 11 U.S.C. § 107(a) because such issues are better addressed by the Administrative Office of the U.S. Courts. However, the NDC believes that debtors should be advised that their bankruptcy file is public information.

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[11] In order for a party in interest to identify the appropriate bankruptcy case, trustees must disclose some **Case Information**, but this is usually limited to the debtor's name, address, case number, filing date, and other relevant dates such as the first meeting of creditors, the bar date for filing claims, and the confirmation hearing. Few privacy interests are raised by such disclosures.

[12] In this context, parties in interest include the bankruptcy court, the clerk's office, and the United States Trustee. The NDC also recognizes that there is a legitimate need for information to assist in academic research or study, but such information can be provided to qualified academics after deletion or encoding of personally identifying information.

The NDC also believes that debtors should be advised that trustees may make **Status Information** available to parties in interest over the Internet, but that such information will be limited primarily to filed claims, debtor payments and trustee disbursements.

The Study should recognize that debtors voluntarily elect to file under Chapter 13 to obtain a discharge or reorganization of debts. As such, debtors should be willing to accept the *quid pro quo* of full disclosure in exchange for an alteration of their debts. However, so that they can make an informed decision as to whether they wish to reveal private and personal information in exchange for the substantial benefits of filing under Chapter 13, debtors should be given sufficient notice that their bankruptcy case information may be disclosed to the public or to parties in interest through any number of information mediums.

WHAT IS THE EFFECT OF TECHNOLOGY ON ACCESS TO AND PRIVACY OF PERSONAL INFORMATION?

In the past, the difficulty of obtaining **Case Information** and **Status Information** by the public or by parties in interest has practically obscured a debtor's bankruptcy filing leading to a "de facto" type of privacy. The evolution of electronic data maintenance and delivery is eroding this practical obscurity. Consequently, the following privacy concepts should be applied as more and more public information is made available on such "super-public" mediums as the Internet:

Notice: debtors should be given notice that their bankruptcy case information may be reviewed by persons and parties in interest.

Use limitation: Trustee should only provide information to parties in interest. Parties in interest should contractually agree that they will only use the information in furtherance of their lawful efforts to assert or collect a claim against the bankruptcy estate (the sale of a bankruptcy claim to a third party should qualify as an appropriate action to collect a claim).

Information Limitation: Trustees should only provide parties in interest with such information as is necessary for them to assert and protect their legally cognizable interests in a bankruptcy case. Specifically, such information should include basic identifying information (debtor's name, address and case number but not a social security number), the status of the debtor's case (open or closed), claims filed in the case, a history of the debtor's payments to the trustee, and a history of the trustee's disbursements to creditors.

Access: Debtors should be able to review their information to verify its scope and accuracy.

Correction: Inaccurate information should be immediately corrected.

Security: Information should be protected from unauthorized access or disclosure.

Technology can assist all participants in the Chapter 13 process to more efficiently and effectively fulfill their duties and responsibilities. The courts, the United States Trustee, the NACTT and the Administrative Office of the U.S. Courts should encourage the increased use of technology to not

only make appropriate bankruptcy case information available to parties in interest, but to ensure that a debtor's legitimate privacy interests are protected through appropriate access and use restrictions.

Conclusion

The NDC believes that the governmental administrators of the consumer bankruptcy process should foster a means of assisting Chapter 13 trustees in fulfilling their statutory duty to furnish parties in interest with **Status Information** while protecting the legitimate and reasonable privacy interests of debtors. The NDC believes that its operational model of a not-for-profit entity that is managed and supported by trustees and that is structured to facilitate the efficient distribution of appropriate bankruptcy information to parties in interest, while providing adequate safeguards to prevent violations of a debtor's reasonable privacy interests, is one that should be supported by the government.

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